DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-868
Title: Ashbel T. Wall, II, Director, Rhode Island Department of Corrections, Petitioner
v.
Khalil Kholi
Docketed: January 21, 2010
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (08-1159)
Decision Date: September 23, 2009
Rehearing Denied: October 20, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 19 2010	Petition for a writ of certiorari filed. (Response due February 22, 2010)
Mar 10 2010	DISTRIBUTED for Conference of March 26, 2010.
Mar 17 2010	Response Requested. (Due April 16, 2010)
Apr 15 2010	Brief of respondent Khalil Kholi in opposition filed.
Apr 15 2010	Motion for leave to proceed in forma pauperis filed by respondent Khalil Kholi.
Apr 26 2010	Reply of petitioner Ashbel T. Wall, II, Director, Rhode Island Department of Corrections filed. (Distributed)
Apr 27 2010	DISTRIBUTED for Conference of May 13, 2010.
May 17 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 17 2010	Petition GRANTED.
May 25 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 23, 2010.
May 26 2010	Motion to appoint counsel filed by respondent Khalil Kholi.
Jun 8 2010	Motion DISTRIBUTED for Conference of June 24, 2010.
Jun 28 2010	Motion to appoint counsel filed by respondent GRANTED. Judith H. Mizner, Esq., of Boston, Massachusetts, is appointed to serve as counsel for the respondent in this case.
Jul 13 2010	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including August 2, 2010.
Jul 23 2010	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including August 9, 2010.
Aug 9 2010	Brief of petitioner A.T. Wall, Director, Rhode Island Department of Corrections filed.
Aug 9 2010	Joint appendix filed. (Statement of costs filed)
Aug 16 2010	Brief amici curiae of Delaware, et al. filed.
Sep 2 2010	The time within which to file respondent's brief on the merits is extended to and including October 8, 2010.
Sep 7 2010	SET FOR ARGUMENT ON Monday, November 29, 2010.
Sep 14 2010	CIRCULATED.
Sep 22 2010	The time within which to file respondent's brief on the merits is further extended to and including October 18, 2010.
Sep 23 2010	Record received from U.S.C.A. for First Circuit. (1 envelope)
Oct 1 2010	Record received from U.S.D.C. for District of Rhode Island. (1 envelope)
Oct 18 2010	Brief of respondent Khalil Kholi filed. (Distributed)
Nov 17 2010	Reply of petitioner Ashbel T. Wall, II, Director, Rhode Island Department of Corrections filed. (Distributed)
Nov 29 2010	Argued. For petitioner: Aaron L. Weisman, Assistant Attorney General, Providence, R. I. For respondent: Judith H. Mizner, Federal Public Defender,

Boston, Mass. (Appointemd by this Court.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-868

JAN 19 2010
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In The
Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

AARON L. WEISMAN
Assistant Attorney General
Chief, Criminal Division
Appellate Unit

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
(401) 222-2995 (facsimile)

Attorneys for Petitioner A.T. Wall

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED FOR REVIEW

Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas corpus petition, an issue as to which there is a 3-2 circuit split?

PARTIES TO THE PROCEEDING

Khalil Kholi was the petitioner-appellant in the courts below and is the Respondent in this Court. The Rhode Island Department of Attorney General was, by order of the district court, the designated respondent, on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, and appellee in the courts below, and is the Petitioner in this Court.

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OPINIONS BELOW

The First Circuit's panel opinion in *Kholi v. Wall* is reported at 582 F.3d 147 (1st Cir. 2009), and set forth in App. 2-20. The December 28, 2007, district court Order, App. 21, is unreported. Such Order is, however, along with the December 11, 2007, magistrate judge's Report and Recommendation, App. 22-31, that it adopted, available at 2008 WL 60194 (D.R.I. Jan. 3, 2008).

STATEMENT OF JURISDICTION

The panel of the Court of Appeals issued its opinion and entered judgment for the respondent on September 23, 2009. App. 1. Thereafter, on October 20, 2009, the Court of Appeals entered an Order denying Petitioner's timely motion for rehearing *en banc*. App. 32-33. The 90-day period for filing a petition for certiorari ends on January 19, 2010. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE & PROCEDURAL RULE INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), in particular, the portion codified at 28 U.S.C. § 2244(d), provides in pertinent part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the federal predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

App. 34-37 (28 U.S.C. § 2244(d)).

Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed, or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. The court shall act on the motion within a reasonable time, provided that any delay by the court in ruling on the motion shall not prejudice the movant. The court may reduce a sentence, the execution of which has been suspended, upon revocation of probation.

R.I.R. Crim. P. 35(a).

STATEMENT OF THE CASE

In December 1993, a Rhode Island jury convicted Khalil Kholi of ten counts of first degree sexual assault, in violation of R.I. Gen. Laws § 11-37-2, for molesting his two stepdaughters. App. 3. The Rhode

Island Superior Court sentenced Kholi to six concurrent life sentences, to run consecutive to four concurrent life sentences. App. 3. The Rhode Island Supreme Court affirmed Kholi's judgment of conviction on February 29, 1996, in *State v. Kholi*, 672 A.2d 429 (R.I. 1996). App. 3-4. Kholi did not petition the Rhode Island Supreme Court for re-argument or this Court for the issuance of a writ of certiorari. App. 4.

On May 16, 1996, Kholi filed a motion to reduce sentence in the Rhode Island Superior Court pursuant to Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure. App. 4. The superior court denied Kholi's motion on August 27, 1996, a decision that the Rhode Island Supreme Court affirmed on January 16, 1998, in *State v. Kholi*, 706 A.2d 1326 (R.I. 1998). App. 4.

On May 23, 1997, while his motion to reduce sentence was pending, Kholi filed an application for post-conviction relief in the Rhode Island Superior Court pursuant to R.I. Gen. Laws §§ 10-9.1-1 to 10-9.1-12. App. 4. The Superior Court ultimately denied that post-conviction relief application on April 23, 2003, a decision the Rhode Island Supreme Court affirmed on December 14, 2006, in *Kholi v. Wall*, 911 A.2d 262 (R.I. 2006). App. 4-5.

Nearly nine months later, on September 5, 2007, Kholi filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Rhode Island. App. 5.

The Attorney General for the State of Rhode Island ("State"), on behalf of petitioner A.T. Wall, Director of the Rhode Island Department of Corrections, moved to dismiss the habeas petition as time-barred. App. 5.

On December 12, 2007, the magistrate judge to whom the State's motion to dismiss had been referred issued a Report and Recommendation recommending that the district court dismiss Kholi's habeas petition with prejudice. App. 5. The magistrate judge determined that, since Kholi filed his habeas petition more than eleven years after his state court convictions became final in 1996, Kholi's petition would be time-barred unless the limitations period had been sufficiently tolled. App. 25-26. There was no dispute that Kholi's 1997 post-conviction relief application tolled the limitations period; nor was there any dispute that if Kholi's state sentence-reduction motion did not also toll the limitations period, his § 2254 petition would be untimely. App. 26.

The magistrate judge, embracing the holdings of three circuit courts (*Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008); *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007); *Walkowiak v. Haines*, 272 F.3d 234, 239 (4th Cir. 2001)) while finding "unpersuasive" the reasoning of another (*Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006)), determined that Kholi's "Motion under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure was *not* a 'properly filed application for post-conviction or other collateral review' under

28 U.S.C. § 2244(d)(2), and therefore did not toll the limitations period." App. 27-30 (emphasis in original). Explained the magistrate judge:

> When a prisoner in State custody opts to file a motion that is a plea for leniency, the State is not being asked to correct legal errors. Whatever interest the State has in deciding the motion, its interest is not one in correcting errors before the Federal Courts assume jurisdiction. Moreover, if this Court was to hold that the Rule 35(a) Motion has the effect of tolling the limitations period of 28 U.S.C. § 2244(d)(1), it would create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic.

App. 30.

The magistrate judge's recommendation to grant the State's dismissal motion was accepted, over Kholi's objection, by the district court, which then dismissed Kholi's habeas petition with prejudice, and entered judgment for the State. App. 21.

Kholi then sought, in the United States Court of Appeals for the First Circuit, a certificate of appealability from the district court's dismissal of his § 2254 petition. "Recogniz[ing] the split in authority regarding whether a motion to reduce sentence may constitute a 'properly filed application for State post-conviction or other collateral review' under 28 U.S.C. § 2244(d)(2)," that such issue had "not yet [been] addressed" by "[t]he First Circuit," and that "the timeliness of [Kholi's] § 2254 petition turns on

whether his motion to reduce sentence acts as a tolling mechanism under § 2244(d)(2)," the Court of Appeals entered an unpublished Order on August 22, 2008, granting the certificate of appealability, and "invit[ing] further briefing on . . . [w]hether a post-conviction motion to reduce sentence, that seeks merely discretionary leniency and does not challenge the legality of the sentence or conviction, acts as a state tolling mechanism under 28 U.S.C. § 2244(d)(2)." The Court of Appeals further directed that the Federal Public Defender's office be appointed to represent Kholi. *Id.*

Following full briefing and oral argument, a panel of the First Circuit, on September 23, 2009, reversed the district court's order of dismissal. *Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009). In so doing, the panel determined, in relevant part, that although the Rule 35 motion filed by Kholi was indeed "a plea for [sentence] leniency," App. 9, it was also "obviously a motion that seeks state post-conviction review of that sentence," App. 11, and thus "self-evident[ly]" qualified as an "application for State post-conviction . . . review with respect to the pertinent judgment" under 28 U.S.C. § 2244(d)(2). App. 12. In so holding, the panel opined that the Court of Appeals for the Fourth Circuit in *Walkowiak*, 272 F.3d at 239, had wrongly interpreted the clause, "State post-conviction or other collateral review" in § 2244(d)(2), as encompassing collateral review only. App. 12-13. The First Circuit essentially concluded that the phrase "State post-conviction . . . review" includes, as well, applications

for direct or "supplemental" review of the relevant judgment. App. 13-14.

Expressing, moreover, its disagreement with the Courts of Appeals for the Eleventh and Third Circuits, *see Alexander*, 523 F.3d at 1297; *Hartmann*, 492 F.3d at 483-84, the panel's decision went on to explain why tolling during the time in which a state prisoner pursues even a purely discretionary sentence-reduction motion presents no "insult" to the AEDPA's "exhaustion requirement," and advances the AEDPA's concern that federal habeas corpus review take place only upon the conclusion of the state direct and collateral review process. App. 15-18. Concluding, then, "that a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of 28 U.S.C. § 2244(d)(2)," the Court of Appeals reversed the district court's order of dismissal and remanded the case for further proceedings. App. 19.

The Court of Appeals denied the State's motion for rehearing and rehearing *en banc* on October 20, 2009. App. 32.

Seeking review of the First Circuit's opinion and judgment, Petitioner submits the instant petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE SPLIT ON WHETHER A STATE COURT SENTENCE-REDUCTION MOTION BASED ON A PLEA FOR LENIENCY TOLLS THE AEDPA'S LIMITATIONS PERIOD.

A. The First Circuit's decision that a motion for discretionary reduction of sentence qualifies as an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2) squarely conflicts with published decisions from the Third, Fourth, and Eleventh Circuits.

In *Walkowiak*, a panel of the Fourth Circuit considered "[t]he straightforward issue [of] . . . whether a [sentence reduction] motion under Rule 35(b) [of the West Virginia Rules of Criminal Procedure] constitutes an application for 'State post-conviction or other collateral review' within the meaning of section 2244(d)(2)." *Walkowiak*, 272 F.3d at 236. Writing for the panel, Judge Luttig explained that, although "[t]he phrase 'State post-conviction or other collateral review' is not defined within the AEDPA," "under the plain language of section 2244(d)(2) – 'State post-conviction or *other* collateral review' (emphasis added) – the applicable one-year statute of limitations is tolled only for state *collateral*, post-conviction review." *Id.* at 236 (emphasis in original). Reinforcing its view that the phrase "State post-conviction or other collateral review" comprehends state *collateral* review only,

the Fourth Circuit cited this Court's language in *Duncan v. Walker*, 533 U.S. 167 (2001), wherein this Court noted that "Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different States employ to represent the different forms of *collateral* review that are available after a conviction," *id.* at 177 (emphasis added).

Turning next to the meaning of "collateral review," the Fourth Circuit explained that since a sentence reduction motion under West Virginia Rule of Criminal Procedure 35(b) was, rather than "a proceeding separate and distinct from the proceeding in which the original judgment rendered," "part and parcel of the same proceeding in which the defendant was sentenced," it could not properly be characterized as a "collateral review" proceeding. *Walkowiak*, 272 F.3d at 237-38. Moreover, the Fourth Circuit explained, "'collateral' proceedings . . . typically entail a challenge to the legality of the earlier proceeding or judgment," and a motion under West Virginia Rule 35(b), which is simply a plea for leniency from a *presumptively valid* conviction, hardly does that. *Id.* The panel of the Fourth Circuit thus determined that a plea for a leniency-based sentence-reduction motion, being not "collateral review," fell outside of § 2244(d)(2)'s tolling provision. *Id.*

Likewise, examining a sentence-reduction motion filed under Delaware Superior Court Criminal Rule 35(b), the Third Circuit, in *Hartmann*, held that such a motion – merely "a plea for leniency, directed

toward the sentencing court, . . . seek[ing] discretionary relief based on mercy and grace, rather than on the law" – plainly did not come within the "State post-conviction or other collateral review" language of § 2244(d)(2). *See Hartmann*, 492 F.3d at 483. The Third Circuit further explained that a contrary holding would impede one important principle embedded in the AEDPA – finality of state court judgments – without at all advancing a competing one – exhaustion of state remedies, since "[w]hatever interest the state has in deciding [leniency-predicated sentence reduction] . . . motion[s], its interest is not one in correcting errors before the federal courts assume jurisdiction." *Hartmann*, 492 F.3d at 483. And it noted that if such sentence reduction motions *did* qualify as applications for "State post-conviction or other collateral review" under § 2244(d)(2), there would exist an "incentive for prisoners to file frivolous requests for leniency merely as a delay tactic." *Id.* at 484. The Third Circuit thus "conclude[d] that a motion for sentence reduction properly filed pursuant to Delaware Superior Court Criminal Rule 35(b) does not have the effect of tolling the limitations period set forth in 28 U.S.C. § 2244(d)(1)." *Id.*

The Court of Appeals for the Eleventh Circuit, in *Alexander*, similarly determined that a sentence-reduction motion only "request[ing] leniency from the sentencing court based on mitigating circumstances," *Alexander*, 523 F.3d at 1295, could not qualify as an "application for State post-conviction or other collateral review" under § 2244(d)(2). *Id.* at 1295, 1297-98.

And it, too, in arriving at its determination, took into account both the AEDPA's interest in the finality of state court judgments and the exhaustion of state court remedies. *Id.*; *see also Bridges v. Johnson*, 284 F.3d 1201, 1203-04 (11th Cir. 2002) (in holding that petitioner's application to a Georgia sentence review panel seeking discretionary sentence review did not constitute a post-conviction proceeding for the purposes of tolling AEDPA's limitations period, the court noted that the sentence review panel's sole task was to determine whether the sentence was excessively harsh, and thus reasoned that viewing the since-repealed Georgia statute as a means to toll the limitations period "would not enhance exhaustion of state remedies or finality of state court judgments."); *Davis v. Barrow*, 540 F.3d 1323, 1324 (11th Cir. 2008) (relying upon *Alexander* to hold that Georgia inmate's state court motion for reduced sentence did not toll the one-year limitation period).

B. The First Circuit's decision that a motion for discretionary reduction of sentence qualifies as an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), is consonant with the view taken by the Tenth Circuit.

In *Robinson*, 443 F.3d at 720-21, the Tenth Circuit, albeit with limited discussion, held that a sentence reduction motion made pursuant to Colorado Rule of Criminal Procedure 35(b) qualified as an

"application for State post-conviction or other collateral review" under § 2244(d)(2). In so determining, the Tenth Circuit, citing to two prior unpublished decisions addressing the issue, mirrored the panel's concern in this case, App. 18, that a contrary holding would raise questions of comity, presumably because the Colorado sentence-reduction proceedings would be ongoing during the federal habeas proceeding. *See Robinson*, 443 F.3d at 720-21.

A number of months after its decision in *Robinson*, the Tenth Circuit, in *Howard v. Ulibarri*, 457 F.3d 1146, 1147-49 (10th Cir. 2006), reaffirmed its position, holding, as against the "contrary reasoning of the Fourth Circuit," that a motion for modification of sentence under New Mexico Rule of Criminal Procedure 5-801(B) tolled the AEDPA's limitations period.

C. There exists a clear and direct split among the circuits.

There exists, then, a clear and direct conflict among the Circuits – the First and the Tenth as against the Third, Fourth, and Eleventh – on the purely legal question of whether a motion filed in state court for discretionary sentence review is an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2).

II. THE CIRCUIT SPLIT PRODUCES INCONSISTENT HOLDINGS AS TO THE RIGHTS OF STATE INMATES TO PURSUE FEDERAL HABEAS RELIEF, AND SIGNIFICANT UNCERTAINTY IN THOSE CIRCUITS THAT HAVE NOT YET DECIDED THE ISSUE.

More than 1.4 million individuals are incarcerated in state prisons. *See* Bureau of Just. Statistics, U.S. Dep't of Justice, Dec. 2009 Bulletin, NCJ 228230, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf. Since a majority of the states have discretionary sentence-reduction provisions analogous to Rule 35 of the Rhode Island Rules of Criminal Procedure (indeed, at least one state within each Circuit has such a provision),[1] it is not surprising that the federal courts have had to, with some regularity, grapple with the issue of whether these familiar sentence-reduction motions qualify as a § 2244(d)(2) tolling mechanism. By virtue of the

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[1] *See, e.g.*, Alaska R. Crim. P. 35; Colo. R. Crim. P. 35; Conn. Gen. Stat. Ann. § 53a-39; D.C. Sup. Ct. R. Crim. P. 35; Del. Super. Ct. Crim. R. 35; Fla. R. Crim. P. 3.800; Haw. R. Pen. P. 35(b); Idaho Crim. R. 35; Ind. Code Ann. § 35-38-1-17 (West Supp. 2007); 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2007); La. Code Crim. Proc. Ann. art. 881.1; Mass. R. Crim. P. 29; Md. R. 4-344, 4-345; Me. R. Crim. P. 35(c); N.D. R. Crim. P. 35; N.J. Ct. R. 3:21-10; N.M.R. Crim. P. 5-801; N.Y.R. Crim. P. 450.15, 450.30; Okla. Stat. Ann. tit. 22, § 982a (West 2003); Pa. R. Crim. P. 720; S.D. Codified Laws § 23A-31-1 (1998); Tenn. R. Crim. P. 35; Va. Code Ann. § 19.2-303 (Supp. 2007); 13 Vt. Stat. Ann. § 7042 (1998); W. Va. R. Crim. P. 35(b); Wis. Stat. § 973.195 (2006).

extant circuit split, state prisoners in the Third, Fourth, and Eleventh Circuits operate under a different tolling calculus than do state prisoners situated in the Tenth and, now, First Circuits. Interest in the uniform application of federal law in such a critical area as federal habeas corpus jurisprudence, should counsel against permitting such circuit inconsistency to persist. Especially, that is, on an important and recurring issue of federal habeas corpus procedure, a conflict among five circuits should not be left to fester.

Of even greater concern, to be sure, is that the five-circuit conflict creates real and substantial uncertainty within the seven circuits that have not yet addressed the question presented in this petition. The palpable and profound divide between the Third, Fourth, and Eleventh Circuits, and the Tenth and the First Circuits, on this significant and recurring issue, will, if allowed to persist, indubitably result in confusion and uncertainty among habeas litigants as to whether an application to a state court for the reduction of sentence tolls AEDPA's one-year limitations period.

As this Court has, in recent years, recognized the need for uniformity in the interpretation of AEDPA's tolling provision by resolving a number of conflicts arising out of the application of the limitations period, *see, e.g., Allen v. Siebert*, 552 U.S. 3, 4 (2007) (effect of state-imposed time limit on AEDPA's limitation period); *Day v. McDonough*, 547 U.S. 198, 202 (2006) (effect of miscalculation by state court of

the elapsed time under AEDPA's limitations period); *Evans v. Chavis*, 546 U.S. 189, 192 (2006) (timeliness of an appeal filed three years after the lower court's judgment); *Lawrence v. Florida*, 549 U.S. 327, 329 (2007) (tolling effect of petition for writ of certiorari); *Pace v. DiGugliemo*, 544 U.S. 408, 410 (2006) (tolling effect of an untimely state post-conviction petition for writ of habeas corpus), it should likewise grant certiorari in this case and resolve the circuit split.

Finally, in resolving the circuit split presented in this case, this Court would likely define the contours of those state court submissions that are, or are not, contemplated by § 2244(d)(2)'s "State post-conviction or other collateral review" tolling provision. Given the sundry, often *pro se*, pleadings submitted in state court, it is not surprising that the federal courts have had to, again with some frequency, wrestle with determining whether a particular review motion is a tolling mechanism. *See, e.g., Harris v. Director, Va. Dep't of Corr.*, 282 F. App'x 239, 242-43 (4th Cir. 2008) (considering whether "mandamus petition" filed by Virginia inmate tolls); *Ali v. Tennessee Bd. of Pardon & Paroles*, 431 F.3d 896, 897 (6th Cir. 2005) ("assuming . . . for the sake of argument . . . that Tennessee court review of parole determinations is collateral for purposes of the tolling provision of 28 U.S.C. § 2244(d)(2)"); *Brown v. Sec'y, Dep't of Corr.*, 530 F.3d 1335, 1337-38 (11th Cir. 2008) (taking up whether DNA testing motion under Florida criminal rule qualified for tolling under § 2244(d)(2)); *Hutson v. Quarterman*, 508 F.3d 236, 238 (5th Cir. 2007) (same

question with respect to Texas DNA testing motion); *Streu v. Dormire*, 557 F.3d 960, 963-64 (8th Cir. 2009) (examining "whether a motion to reopen state post-conviction proceedings in Missouri is an 'application for State post-conviction or other collateral review' within the meaning of the tolling provision"); *Meadows v. Jacquez*, 242 F. App'x 453, 455 (9th Cir. 2007) (deciding whether California state prisoner's mandamus petition to compel production of medical records qualified for tolling); *Sindar v. Turley*, 2009 WL 2734661, at * 2 (10th Cir., Aug. 28, 2009) (deciding whether Utah prisoner's application for protective order and "malfeasance in office" complaints tolled the statute of limitations); *Voravongsa v. Wall*, 349 F.3d 1, 6-7 (1st Cir. 2003) (considering whether to toll while state motion to appoint counsel to assist in the filing of a post-conviction relief application was being reviewed). A decision from this Court resolving the circuit split on the issue presented will, necessarily, serve to more precisely explicate for the lower federal courts the metes and bounds of § 2244(d)(2)'s "State post-conviction or other collateral review" provision.

This Court's resolution of the widening conflict, then, would not only put to an end circuit inconsistency, and promote the uniform interpretation of an important and frequently applied clause in federal habeas corpus law, but would also provide guidance to the lower courts in assessing whether a particular state court application should toll AEDPA's one-year limitations period.

III. THE FIRST CIRCUIT'S DECISION IS NEITHER SUPPORTED BY THE PLAIN LANGUAGE OF 28 U.S.C. § 2244(d)(2), NOR CONSISTENT WITH THE LONG-STANDING INTEREST IN THE FINALITY OF STATE COURT JUDGMENTS.

This case presents the straightforward question of whether an application to a state court for the reduction of sentence based on a plea for leniency is an "application for State post-conviction or other collateral review with respect to the pertinent judgment" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2) (emphasis added). In answering this question in the affirmative, and holding that the phrase "post-conviction . . . review" is not restricted to *collateral* review, App. 12-14, the First Circuit appears to have altogether overlooked the word "other" in § 2244(d)(2) ("application for State post-conviction or *other* collateral review") (emphasis added), effectively rewriting the clause to provide for tolling for the time during which a properly filed "application for [1] State post-conviction [review] or [2] collateral review" is pending. Section § 2244(d)(2), however, plainly does not read that way; the use of the word "other" in the phrase "*other* collateral review," *id.* (emphasis added), evidently indicates that "State post-conviction" applications must also be collateral.

As the Fourth Circuit explained in *Walkowiak*, "under the plain language of section 2244(d)(2) – 'State post-conviction or *other* collateral review' (emphasis added) – the applicable one-year statute

of limitations is tolled only for state *collateral*, post-conviction review." *Walkowiak*, 272 F.3d at 236 (emphasis in original). "This plain language interpretation of the section," the Fourth Circuit's decision went on to explain, "gives meaning to each and every word of the provision, which a reading of the statute to require tolling during *any* form of review after conviction (collateral or otherwise) would not." *Id.* at 236-37; *see also Malcom v. Payne*, 281 F.3d 951, 958 (9th Cir. 2002) (stating that "we know that the statute – by referring to '*other* collateral review' (emphasis added) – uses the term 'State post-conviction . . . review' as simply one type of 'collateral review.'"); *Duncan*, 533 U.S. at 177 (noting that "Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different States employ to represent the different forms of *collateral* review that are available after a conviction," and that "Congress may have refrained from exclusive reliance on the term 'post-conviction' so as to leave no doubt that the tolling provision applies to all types of state *collateral* review after a conviction and not just to those denominated 'post-conviction' in the parlance of a particular jurisdiction.") (emphasis added); *Carey v. Saffold*, 536 U.S. 214, 216-17 (2002) (characterizing § 2244(d)(2) as providing for tolling during the time in which "an application for state *collateral* review is 'pending' in state courts.") (emphasis added).

Had the First Circuit, then, properly read "post-conviction . . . review" as contemplating one type,

indeed, the prototype, of state collateral review applications, *see Duncan*, 533 U.S. at 177 ("the term 'post-conviction' may denote a particular procedure for review of a conviction that is distinct from other forms of what conventionally is considered to be post-conviction review"), it would have recognized that the Rule 35 sentence-reduction motion filed by Kholi could only have been a tolling mechanism if it qualified as either (1) a collateral "post-conviction . . . review" application, or (2) some "other collateral review" application.

Since both types of tolling applications must constitute "collateral review," the Fourth Circuit in *Walkowiak*, 272 F.3d at 237, correctly sought the definition of such term, finding it to refer, after examining the Black's Law Dictionary definition of "collateral attack," "to a proceeding separate and distinct from that in which the original judgment was rendered." *Walkowiak*, 272 F.3d at 237 (*citing Black's Law Dictionary* (7th ed. 1999)).

Did the plea-for-leniency sentence-reduction motion filed by Kholi initiate "a proceeding separate and distinct from that in which the original judgment was rendered"? Since such "motion is filed in the original criminal case," App. 14, comes before the same sentencing judge, *see, e.g., State v. Brown*, 821 A.2d 695, 697 (R.I. 2003) ("Rule 35 motions for reduction of sentence appropriately are heard by the original sentencing justice"), merely seeks (and only "during a limited period after sentencing") "leniency" from the sentencing judge (Reporter's Notes to

Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure), does not challenge the lawfulness of the original sentence, *see, e.g., State v. Byrnes*, 456 A.2d 742, 744 (R.I. 1983) (Rule 35's sentence reduction provision "authorizes a court to reduce a *lawful* sentence") (emphasis added), and is obviously not precluded or estopped by the earlier sentencing proceeding, *see, e.g., id.* at 745 (sentence may be reduced at trial judge's discretion if she decides "that the sentence originally imposed was, for any reason, unduly severe"), it should be clear that the Rule 35 motion filed by Kholi did *not* initiate "a proceeding separate and distinct from that in which the original judgment was rendered," *Walkowiak*, 272 F.3d at 237. Because, that is, such sentence-reduction motion was "part and parcel of the original proceeding in which the defendant was sentenced," *id.* at 237, was, actually, "one in the same with the original proceeding in which the sentence was actually imposed," *id.*, the First Circuit should have recognized that Kholi's sentence-reduction motion was hardly a "proceeding[ ] . . . supplementary to the underlying criminal case," App. 14-15 n.6, and was, thus, not any type of *collateral* review application pursuant to § 2244(d)(2).

Moreover, while the First Circuit's opinion rightly pointed to the AEDPA's concern with "principles of comity and federalism," App. 16, its interpretation of § 2244(d)(2) too easily dismissed Congress' equally important concern with the finality of state court judgments of conviction. One of the reasons, indeed,

that Congress enacted the AEDPA was to "combat increasingly pervasive abuses of the federal courts' habeas jurisdiction," *Delaney v. Matesanz*, 264 F.3d 7, 10 (1st Cir. 2001) (*citing Felker v. Turpin*, 518 U.S. 651, 664 (1996)), and the one-year limitations period in 28 U.S.C. § 2244(d)(1) "quite plainly serves the well-recognized interest in the finality of state court judgments," *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Like the Third and Eleventh Circuits recognized in *Hartmann* and *Alexander*, then, the First Circuit, in its analysis of whether a sentence-reduction motion is a tolling mechanism, should have recognized that tolling the limitations period during the pendency of a sentence-reduction motion does substantial violence to the well-recognized interest in the finality of state court judgments, without at all advancing the AEDPA's exhaustion requirement, since "[w]hatever interest the state has in deciding [leniency-predicated sentence reduction] . . . motion[s], its interest is not one in correcting errors before the federal courts assume jurisdiction." *Hartmann*, 492 F.3d at 483.

In any event, the below opinion of the First Circuit has substantially widened the circuit split on the question whether state motions for discretionary sentence review toll the AEDPA's limitation period under § 2244(d)(2), and this Court should accept review to resolve the narrow legal question presented in this petition.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

AARON L. WEISMAN
Assistant Attorney General
Chief, Criminal Division
Appellate Unit

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
(401) 222-2995 (facsimile)

Attorneys for Petitioner A.T. Wall

United States Court of Appeals
For the First Circuit

No. 08-1159

KHALIL KHOLI,

Petitioner, Appellant,

v.

A.T. WALL,

Respondent, Appellee,

JUDGMENT

Entered: September 23, 2009

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's order of dismissal is reversed, and the matter is remanded to the district court for further proceedings consistent with the opinion issued this day.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Ms. Conrad, Ms. Mizner,
Mr. Weisman, & Mr. Bush.

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582 F.3d 147

United States Court of Appeals,
First Circuit.

Khalil KHOLI, Petitioner, Appellant,
v.
A.T. WALL, Respondent, Appellee.

No. 08-1159.

Heard July 29, 2009.
Decided Sept. 23, 2009.

Judith H. Mizner, Assistant Federal Public Defender, for petitioner.

Christopher R. Bush, Special Assistant Attorney General, with whom Patrick C. Lynch, Attorney General, was on brief, for respondent.

Before TORRUELLA, SELYA and DYK,* Circuit Judges.

SELYA, Circuit Judge.

This appeal presents a question of first impression in this circuit. It turns on the correct interpretation of the tolling provision, 28 U.S.C. § 2244(d)(2), established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214.

The problem is easily explained. The court below held that a state-court post-conviction motion to

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* Of the Federal Circuit, sitting by designation.

reduce an imposed sentence, in the nature of a plea for discretionary leniency, did not fall within the scope of the tolling provision. Accordingly, the court dismissed the federal habeas petition as time-barred.

Although the question presented is one of novel impression in this circuit, four other courts of appeals have answered essentially the same question, with mixed results. Three have held that a state post-conviction motion in the nature of a plea for discretionary leniency does not give rise to tolling; the fourth has held the opposite. For the reasons that follow, we conclude that the filing of a state post-conviction motion to reduce an imposed sentence, in the nature of a plea for discretionary leniency, tolls the AEDPA's limitations period. Consequently, we reverse the order of dismissal and remand for further proceedings consistent with this opinion.

I. BACKGROUND

We rehearse the factual and procedural antecedents of this appeal insofar as necessary to place the crucial issue into perspective.

In December of 1993, a Rhode Island jury convicted petitioner-appellant Khalil Kholi on ten counts of first-degree sexual assault. *See* R.I. Gen. Laws § 11-37-2. The charges arose out of the alleged molestation of his two step-daughters. A judge of the state superior court sentenced the petitioner to two terms of life imprisonment, consecutive to one another. The state supreme court affirmed the conviction on

February 29, 1996. *State v. Kholi,* 672 A.2d 429 (R.I.1996).

The petitioner did not move for rehearing, nor did he seek a writ of certiorari in the United States Supreme Court. Instead, he returned to the trial court and, on May 16, 1996, filed a motion to reduce his sentence pursuant to Rhode Island Superior Court Rule of Criminal Procedure 35(a).[1] The trial judge denied that motion on August 27, 1996, and the state supreme court affirmed. *State v. Kholi,* 706 A.2d 1326 (R.I.1998). That ruling was handed down on January 16, 1998.

While the appeal from the denial of the Rule 35(a) motion was pending, the petitioner, citing ineffective assistance of counsel, applied for post-conviction relief (PCR) in the trial court. *See* R.I. Gen. Laws § 10-9.1-1 *et seq.* The application was docketed on May 23, 1997 and denied almost six years later (on

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[1] The rule provides in pertinent part:

> The court . . . may reduce any sentence when a motion is filed . . . within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal. . . . The court shall act on the motion within a reasonable time, provided that any delay by the court in ruling on the motion shall not prejudice the movant.

R.I.Super. Ct. R.Crim. P. 35(a). Although portions of the same rule authorize the superior court to correct illegal sentences and sentences imposed in an illegal manner, those provisions were not invoked by the petitioner's motion.

April 23, 2003). The state supreme court affirmed that ruling on December 14, 2006. *Kholi v. Wall,* 911 A.2d 262 (R.I.2006).

On October 18, 2005 – shortly before the state supreme court resolved the appeal from the denial of the original PCR application – the petitioner filed a second PCR application. This entreaty, which remains pending, alleged that the state had improperly calculated the date when he would become eligible for parole.

On September 5, 2007, the petitioner, appearing pro se, repaired to the federal district court in search of habeas relief. He named as respondent A.T. Wall, the director of the Rhode Island Department of Corrections. The respondent moved to dismiss the federal habeas petition on timeliness grounds.

The district judge referred the motion to a magistrate judge. *See* 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b)(1). In a report and recommendation dated December 12, 2007, the magistrate judge embraced the majority view and concluded that a sentence reduction motion, in the nature of a plea for discretionary leniency, did not toll the AEDPA's limitations period. Absent such tolling, he regarded the habeas petition as untimely and thus recommended that it be dismissed.

On de novo review, the district judge adopted the report and recommendation and entered judgment accordingly. *Kholi v. Wall,* No. 07-346, 2008 WL 60194, at *1 (D.R.I. Jan.3, 2008). The district judge

appended the magistrate judge's report and recommendation to his summary order.[2] The district judge subsequently rejected the petitioner's request for a certificate of appealability (COA).

The petitioner proceeded to ask this court for a COA. We granted the COA and appointed counsel. *Kholi v. Wall,* No. **08-1159** (1st Cir. Aug. 22, 2008) (unpublished order). After full briefing and oral argument, the case is now ripe for decision.

II. ANALYSIS

Where, as here, the district court has dismissed a habeas petition on a procedural ground without taking evidence, we afford de novo review. *Wood v. Spencer,* 487 F.3d 1, 3 (1st Cir.2007).

In this case, the petitioner's state-court conviction became final on May 28, 1996, when his time for requesting a writ of certiorari elapsed.[3] *See Jiménez v.*

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[2] Due to this elision, we do not hereafter distinguish between the district judge and the magistrate judge but, rather, take an institutional view and refer to "the district court." In the same spirit, we refer to the combined order and adopted report as "D. Ct. Op."

[3] In the court below, the state asserted that the conviction became final on June 12, 1996. This assertion rested on the mistaken premise that the time for seeking a writ of certiorari began to run only after the period for requesting reargument before the state supreme court had expired. The district court accepted the state's assertion without apparent inquiry. D. Ct. Op., 2008 WL 60194, at *2. This bevue is of no consequence here.

Quarterman, ___ U.S. ___, 129 S.Ct. 681, 685, 172 L.Ed.2d 475 (2009); *see also* Sup.Ct. R. 13 (indicating that a party has ninety days from entry of judgment to request a writ of certiorari). Thus, the one-year period for seeking federal habeas relief began to run on that date. 28 U.S.C. § 2244(d)(1)(A).

There is no dispute that this one-year period was interrupted from May 23, 1997, through December 14, 2006, due to the pendency of the first (1997) PCR application. *See id.* § 2244(d)(2). Unless some other tolling mechanism is in play, however, the one-year period expired on December 19, 2006 – more than eight months before the petitioner first sought federal habeas relief.

In this venue, the petitioner argues that both his second PCR application and his Rule 35(a) motion constituted tolling mechanisms. If this argument is even partially correct (that is, if either of these filings served to toll the limitations period), the federal habeas petition would be timely.[4] Accordingly, we inquire as to the effect of each filing.

A. *The 2005 PCR Application.*

Although the petitioner failed to mention the 2005 PCR application in the district court, we may in our discretion afford him some latitude because he

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[4] For the reader's convenience, we attach as an appendix a time line setting forth the relevant dates.

was then incarcerated and proceeding pro se. *See, e.g., Raineri v. United States,* 233 F.3d 96, 97 (1st Cir.2000); *Prou v. United States,* 199 F.3d 37, 42 (1st Cir.1999). Because the outcome is clear, we elect to address the merits of this argument.

Our analysis begins and ends with the language of the AEDPA's tolling provision. By its terms, that provision applies to state post-conviction filings directed to "the pertinent judgment or claim." 28 U.S.C. § 2244(d)(2). In a typical habeas case, then, the tolling provision applies only to those state post-conviction filings that seek reexamination of the relevant state-court conviction or sentence. *See Rodríguez v. Spencer,* 412 F.3d 29, 37 (1st Cir.2005) (holding that motion addressed to state appellate court's supervisory powers did not toll the period for seeking federal habeas relief because, under state law, that motion could not affect the judgment of conviction); *Voravongsa v. Wall,* 349 F.3d 1, 6-7 (1st Cir.2003) (holding, for the same reason, that motion for appointment of counsel does not toll the period for filing a federal habeas petition); *Hodge v. Greiner,* 269 F.3d 104, 107 (2d Cir.2001) (holding, for the same reason, that discovery-related proceeding has no tolling effect).

The 2005 PCR application does not seek to alter (or even to reexamine) the judgment entered in the underlying criminal case. That application challenges only the proposed date of the petitioner's parole eligibility. Consequently, it does not bear a sufficient relationship to the pertinent judgment so as to trigger

the tolling provision. The upshot, then, is that the 2005 PCR application is devoid of any effect on the limitations period within which the petitioner had to seek federal habeas relief. *See Rodríguez,* 412 F.3d at 37.

B. *The Rule 35(a) Motion.*

The petitioner's second tolling argument requires more discussion. The district court determined that his post-conviction motion under Rhode Island Superior Court Rule of Criminal Procedure 35(a) did not toll the AEDPA's limitations period because that motion did not challenge the validity of the pertinent conviction or sentence but, rather, amounted to nothing more than a naked plea for leniency. D. Ct. Op., 2008 WL 60194, at *3-4. The district court's view has impressive support in the case law. *See Alexander v. Sec'y, Dep't of Corr.,* 523 F.3d 1291, 1297 (11th Cir.2008); *Hartmann v. Carroll,* 492 F.3d 478, 483-84 (3d Cir.2007); *Walkowiak v. Haines,* 272 F.3d 234, 239 (4th Cir.2001). But the case law is not uniform; one court of appeals has arrived at the opposite conclusion. *See Robinson v. Golder,* 443 F.3d 718, 720-21 (10th Cir.2006). It is against this chiaroscuro backdrop – a circuit split – that we approach the question presented by this appeal.

We start by noting our agreement with the district court's characterization of the petitioner's Rule 35(a) motion as a plea for leniency, simpliciter. *See State v. Mendoza,* 958 A.2d 1159, 1161 (R.I.2008); *see*

also supra note 1. This court has not yet addressed whether a sentence reduction motion, in the nature of a plea for discretionary leniency, may serve as a tolling mechanism in connection with the AEDPA's limitations period.[5] As said, three courts of appeals have answered this same general question in the negative (we use the descriptor "general" because, in each situation, the state rule or statute that served as the vehicle for the plea for leniency reflected minor variations peculiar to practice in that state). A fourth court, however, has answered the same general question in the affirmative. We must, therefore, weigh these conflicting authorities and decide whether the petitioner's Rule 35(a) motion tolled the period within which he could seek federal habeas relief.

Answering this question, like answering any question that hinges on statutory construction, begins with the text of the particular statute. *In re Hill,* 562 F.3d 29, 32 (1st Cir.2009). Here, the statute provides for tolling during the pendency of motions that seek "State post-conviction or other collateral review with

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[5] The respondent notes that in *Rodríguez,* 412 F.3d at 36, we cited *Bridges v. Johnson,* 284 F.3d 1201 (11th Cir.2002). This is a red herring: although the *Bridges* court denied tolling effect to a post-conviction plea for discretionary leniency, *id.* at 1203-04, *Rodríguez* cited *Bridges* only to illustrate the uncontroversial point that courts had not held that all post-conviction motions toll the AEDPA's limitations period. The mere fact that a court cites a case approvingly for one point does not imply the court's wholesale acceptance of each and every proposition for which the cited case stands.

respect to the pertinent judgment or claim." 28 U.S.C. § 2244(d)(2). We must give these words "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor,* 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (internal quotation marks omitted).

Plain meaning strongly favors the petitioner's position. For purposes of this case, the "pertinent judgment" is the petitioner's sentence. *See, e.g., Howard v. Ulibarri,* 457 F.3d 1146, 1148 (10th Cir.2006) (giving tolling effect to motion that related only to sentencing as opposed to validity of conviction); *Tillema v. Long,* 253 F.3d 494, 498 (9th Cir.2001) (same). The Rule 35(a) motion is obviously a motion that seeks state post-conviction review of that sentence. After all, a sentence cannot be reduced without first being reexamined (*i.e.,* reviewed). On its face, then, the language of section 2244(d)(2) appears roomy enough to accommodate sentence reduction motions.

To be sure, a sentence reduction motion in the nature of a plea for discretionary leniency does not challenge the *legality* of the sentence. But there is nothing in the language of section 2244(d)(2) that limits tolling – or that even hints at limiting tolling – to motions that challenge the legal basis of the pertinent judgment. In this regard, we deem it significant that, in drafting section 2244(d)(2), Congress employed the expansive term "review" instead of a more confining term (such as "challenge"). The latter

terminology would have been a natural fit had Congress wished to focus the tolling provision more narrowly.

In contrast, "review" commonly denotes "a looking over or examination with a view to amendment or improvement." Webster's Third New International Dictionary 1944 (2002); *see also* Black's Law Dictionary 1345 (8th ed.2004) (defining "review" as the "[c]onsideration, inspection, or reexamination of a subject or thing"). Taking into account this quotidian understanding, it seems self-evident that a motion for a sentence reduction in the nature of a plea for discretionary leniency is a motion that seeks post-conviction "review" of a sentence and, thus, is a motion that falls squarely within the plain meaning of section 2244(d)(2).

We are mindful that three of our sister circuits have concluded that pleas for leniency do not trigger the AEDPA's tolling provision. These courts have relied on two different lines of reasoning to reach that result.

The first line of reasoning embodies a textual approach. This approach, employed by the Fourth Circuit, holds that the statutory phrase "State post-conviction or other collateral review" contemplates only "*collateral,* post-conviction review." *Walkowiak,* 272 F.3d at 236 (emphasis in original). Based on that understanding, the court concludes that a motion for leniency filed under West Virginia Rule of Criminal Procedure 35(b) does not qualify as a tolling

mechanism because such a motion is not "collateral"; that is, the motion is filed in the original criminal case before the trial judge and does not challenge the validity of the conviction or sentence. *Id.* at 237-39.

We do not believe that the *Walkowiak* line of reasoning can withstand close scrutiny. On its face, the court's reading of the statute seems linguistically incorrect. Conflating the two halves of the phrase "State post-conviction or other collateral review" to mean exclusively "collateral, post-conviction review" reads the word "or" completely out of the statute. Hence, that conflated construction transgresses the rule against superfluities – the rule that instructs a court, in undertaking the interpretation of a statute, to give meaning whenever possible to every word and phrase in a statute's text. *See Hibbs v. Winn,* 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004); *Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001); *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

This conflation is particularly misleading because the most natural reading of the phrase "or other collateral review" *expands* the scope of the tolling provision to cover the entire gamut of state judicial procedures that are available for testing the pertinent conviction or sentence. That remains true regardless of whether such procedures carry a specific label. *See Duncan,* 533 U.S. at 177, 121 S.Ct. 2120.

The plain meaning of the statute is not altered by the fact that a post-conviction motion is not

"collateral," that is, that the motion is filed in the original criminal case. For example, we have held that a motion for a new trial filed in the original case and heard by the trial judge is an appropriate mechanism for tolling under section 2244(d)(2). *See Neverson v. Bissonnette,* 261 F.3d 120, 124 (1st Cir.2001); *Gaskins v. Duval,* 183 F.3d 8, 9-10 (1st Cir.1999) (per curiam).

So, too, the fact that a post-conviction motion is of a type usually heard by the trial judge does not disqualify it as a vehicle for tolling. Thus, a PCR application under Rhode Island General Laws § 10-9.1-1 (Rhode Island's standard vehicle for post-conviction relief) may act as a tolling mechanism even though that application, by rule, is assigned to the original trial judge. *See Pezzucco v. State,* 652 A.2d 977, 979 (R.I.1995) (per curiam) (citing R.I.Super. Ct. Standing Order No. 91-22(II)(D)(3)). Indeed, the petitioner's first PCR application was filed under this statute, and the respondent concedes that this application should be accorded tolling effect. *See* Appellee's Br. at 6. We therefore reject the Fourth Circuit's textual analysis.[6]

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[6] We note that even if the tolling provision is conflated to apply only to applications for *collateral* review – an interpretation that we reject – the petitioner's Rule 35(a) motion would likely qualify. The word "collateral" describes matters that are "[s]upplementary" or "accompanying, but secondary and subordinate to." Black's Law Dictionary, *supra,* at 278. The petitioner's Rule 35(a) motion, as we discuss in further detail *infra,* initiated proceedings that were supplementary to the

(Continued on following page)

The other two courts that have refused to give tolling effect to a plea for leniency have reached that result by interpreting section 2244(d)(2) in light of the AEDPA's discerned purposes. Those courts have noted (correctly, we think) that the AEDPA serves dual purposes: encouraging the exhaustion of state remedies and safeguarding the finality of state-court judgments. Because neither of these interests is advanced by tolling the AEDPA's limitations period during the pendency of a plea for leniency, they have refused to give tolling effect to such motions. *See Alexander,* 523 F.3d at 1297; *Hartmann,* 492 F.3d at 483-84. We find this reasoning unconvincing.

In determining the meaning of a statutory provision, it is appropriate to consider the structure and purpose of the larger statute. *See, e.g., McKenna v. First Horizon Home Loan Corp.,* 475 F.3d 418, 423 (1st Cir.2007). The Supreme Court has indicated that Congress enacted the AEDPA "to further the principles of comity, finality, and federalism." *Williams,* 529 U.S. at 436, 120 S.Ct. 1479. Seen in this light, it is readily apparent that the AEDPA's one-year limitations period is aimed at protecting the states' interest in the finality of state judgments. *See Duncan,* 533 U.S. at 179, 121 S.Ct. 2120; *see also* 28 U.S.C. § 2244(d)(1).

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underlying criminal case (the judgment in which became final independent of the Rule 35(a) motion).

Withal, that interest is not absolute. If it were, the AEDPA would not contain any tolling provision. In the last analysis, the interest in safeguarding finality is tempered by principles of comity and federalism embedded not only in the tolling provision itself, but also in the AEDPA's exhaustion requirement, 28 U.S.C. § 2254(b).

The exhaustion requirement gives state courts the initial opportunity to correct errors otherwise cognizable in federal habeas proceedings. *Duncan,* 533 U.S. at 179, 121 S.Ct. 2120; *O'Sullivan v. Boerckel,* 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). This requirement works hand in hand with the tolling provision, which encourages state prisoners to avail themselves of state remedies before resorting to a federal forum. *See* H.R.Rep. No. 104-23, at 9 (1995) (indicating that the AEDPA will "preserv[e] the availability of [federal habeas] review when a prisoner diligently pursues state remedies"). The tolling provision accomplishes this objective by freezing the limitations period for bringing a federal habeas petition. *Duncan,* 533 U.S. at 179-80, 121 S.Ct. 2120.

If recognizing tolling for a sentence reduction motion in the nature of a plea for discretionary leniency somehow flouted the exhaustion requirement, there might be reason to think that treating such a motion as a tolling device would contradict congressional intent. But that is not the case; recognizing tolling for a plea for discretionary leniency does not insult the exhaustion requirement. By definition, a state-court sentence reduction motion in the nature of

a plea for discretionary leniency does not present a claim premised on an error of federal law. Thus, the filing of such a motion implicates no claim that is susceptible of exhaustion.

To be sure, the Supreme Court has emphasized the nexus between tolling and exhaustion. *See, e.g., id.* at 179, 121 S.Ct. 2120. The Court, however, has said nothing to suggest that tolling is available only for state filings mandated by the exhaustion requirement. To the contrary, the Court has stated that the AEDPA's tolling provision encourages the pursuit of "*all* available state remedies." *Id.* at 180, 121 S.Ct. 2120 (emphasis supplied). This broad statement would seem to encompass pleas for leniency.

In all events, it cannot be a valid objection to tolling that a state post-conviction motion presents only state-law claims and, thus, does not implicate the exhaustion requirement. The case law makes pellucid that tolling may be available even in situations in which the exhaustion requirement is not directly implicated. *See, e.g., Cowherd v. Million,* 380 F.3d 909, 913-14 (6th Cir.2004) (en banc); *Ford v. Moore,* 296 F.3d 1035, 1038-40 (11th Cir.2002) (per curiam); *Carter v. Litscher,* 275 F.3d 663, 665-66 (7th Cir.2001); *Tillema,* 253 F.3d at 498-502. The Third Circuit's "purpose" analysis in effect treats exhaustion and tolling as mirror images. *Hartmann,* 492 F.3d at 484. But that is a distortion. These concepts are separate and distinct, *see Cowherd,* 380 F.3d at 914; *Carter,* 275 F.3d at 666, and they play disparate (though related) roles in the AEDPA scheme.

To cinch matters, even though there is no constitutional claim to exhaust, principles of comity and federalism support tolling while a state prisoner pursues a motion for a sentence reduction. After all, such a motion initiates a separate post-conviction proceeding, which carries with it a concomitant right to appeal. *See, e.g., State v. Day,* 925 A.2d 962, 985 (R.I.2007). Absent tolling, federal habeas courts would be faced with the unseemly prospect of reviewing state-court convictions while parallel proceedings were still ongoing in state court. That would be antithetic to the design that Congress had in mind. *See Currie v. Matesanz,* 281 F.3d 261, 267 (1st Cir.2002); *see also Tillema,* 253 F.3d at 502.

To make matters worse, a rule that deprives a motion for leniency of any tolling effect would encourage the filing of protective habeas petitions – petitions that may prove to be either unnecessary or inauspiciously framed. The granting of a motion for leniency might well eliminate the incentive for seeking federal habeas review at all (as would be true, say, if the motion were granted and the sentence reduced to time served). *See, e.g., Carter,* 275 F.3d at 665; *Tillema,* 253 F.3d at 501. By like token, the outcome of a federal habeas proceeding might be altered by the state court's determination (as would be true, say, if a habeas petition was premised on a claim of ineffective assistance of counsel at sentencing and the sentence-reduction motion was granted with respect to ensuing sentence).

We come full circle. While we recognize that tolling always is at cross purposes with safeguarding the finality of state-court judgments, Congress deliberately inserted a tolling provision for state prisoners' claims into the AEDPA's text. The plain meaning of that provision indicates that a state post-conviction motion for a sentence reduction, in the nature of a plea for discretionary leniency, comes within the statutory sweep. Furthermore, a fair balancing of the competing policies that inform the AEDPA supports tolling during the pendency of such a motion.

To say more would be to paint the lily. We hold that a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of 28 U.S.C. § 2244(d)(2). Thus, the petitioner's Rule 35(a) motion constituted a request for "State post-conviction or other collateral review" within the meaning of the AEDPA. So viewed, his federal habeas petition was timely filed and improvidently dismissed.

III. CONCLUSION

We need go no further. For the reasons elucidated above, we reverse the order of dismissal and remand the matter to the district court for further proceedings.

Reversed and remanded.

APPENDIX

December 15, 1993 – petitioner is convicted in Rhode Island Superior Court.

February 28, 1994 – petitioner is sentenced to two consecutive terms of life imprisonment.

February 29, 1996 – conviction affirmed. *See State v. Kholi,* 672 A.2d 429 (R.I.1996).

May 16, 1996 – Rule 35(a) sentence reduction motion filed.

August 27, 1996 – Superior Court denies Rule 35(a) motion.

May 23, 1997 – first PCR application filed.

January 16, 1998 – denial of Rule 35(a) motion affirmed. *See State v. Kholi,* 706 A.2d 1326 (R.I.1998).

April 23, 2003 – first PCR application denied.

October 18, 2005 – second PCR application filed.

December 14, 2006 – denial of first PCR application affirmed. *See Kholi v. Wall,* 911 A.2d 262 (R.I.2006).

September 5, 2007 – petition for federal habeas relief filed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Khalil Kholi
Petitioner

V. CA 07-346S

A.T. Wall
Respondent

ORDER

The Report and Recommendation of United States Magistrate Judge Lincoln D. Almond filed on December 11, 2007 in the above-captioned matter is accepted pursuant to Title 28 United States Code § 636(b)(1)(B). State of Rhode Island's Motion to Dismiss is GRANTED and Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is DISMISSED with prejudice.

BY ORDER:

/s/ [Illegible]
DEPUTY CLERK

ENTER:

/s/ [Illegible]
WILLIAM E. SMITH
U.S. DISTRICT JUDGE

DATE: 12/28/07

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

KHALIL KHOLI	:	
v.	:	C.A. No. 07-346S
A.T. WALL	:	(Filed Dec. 12, 2007)

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Before this Court is the Petition filed by Khalil Kholi, *pro se* pursuant to 28 U.S.C. § 2254. (Document No. 1). The State of Rhode Island filed a Motion to Dismiss the Petition, arguing that Petitioner failed to exhaust his State Court remedies and that his claim is time-barred under 28 U.S.C. § 2244. (Document No. 4). Petitioner filed an Opposition to the Motion to Dismiss. (Document No. 8). The matter has been referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and LR Cv 72(a). The Court has determined that no hearing is necessary. After reviewing the memoranda submitted by the parties and considering relevant legal research, I recommend that the Motion to Dismiss (Document No. 4) be GRANTED and that the Petition (Document No. 1) be DISMISSED WITH PREJUDICE.

Background

In December 1995, Petitioner was convicted in Rhode Island Superior Court of ten counts of first-degree sexual assault on his two stepdaughters.[1] Petitioner was sentenced to two consecutive life sentences. On May 16, 1996, Petitioner filed a Motion to Reduce Sentence pursuant to R.I. Super. Ct. R. Crim. P. 35(a) ("Rule 35"). His Rule 35 Motion was denied by the Superior Court, and the denial was affirmed by the Rhode Island Supreme Court ("RISC") on January 16, 1998. *See State v. Kholi*, 706 A.2d 1326 (R.I. 1998). On May 23, 1997, while Petitioner's Rule 35 Motion was pending in State Court, he filed an application for post-conviction relief. The Rhode Island Superior Court denied the post-conviction relief application in April 2003, and the RISC affirmed the denial on December 14, 2006. *See Kholi v. Wall*, 911 A.2d 262.

Following the RISC's denial of his post-conviction relief motion, Petitioner filed the present habeas corpus action on September 5, 2007,[2] claiming six

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[1] Much of the relevant factual and procedural background to this case is set forth in the Rhode Island Supreme Court's February 29, 1996 Decision. *See State v. Kholi*, 672 A.2d 429 (R.I. 1996).

[2] Although his Petition was not filed with the Court until September 12, 2007, Petitioner states that it was deposited in the prison's mail system on September 5, 2007. *See* Petition at 19. A *pro se* prisoner's motion under 28 U.S.C. § 2254 is deemed filed on the date the petition is deposited in the prison's internal

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grounds for relief. Grounds One, Two and Six raise ineffective assistance of counsel claims; Ground Three raises a defective indictment claim; Ground Four raises an innocence claim; and Ground Five raises a Rule 16 discovery violation claim. *See* Document No. 1. On September 13, 2007, District Judge Smith ordered the State to submit a response to the Petition, and the State filed its Motion and Memorandum to Dismiss on September 21, 2007. In its Motion, the State argued only that the Petition is barred by the one-year statute of limitations contained in 28 U.S.C. § 2244. On October 18, 2007, after reviewing the parties' submissions, this Court ordered the State to submit a Supplemental Memorandum addressing the dispositive issue of whether Petitioner's Rule 35 Motion to Reduce Sentence is considered a "properly filed application for post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2) and thus tolls the limitation period. *See* Document No. 9.

Discussion

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides for a one-year statute of limitation for petitions filed under 28 U.S.C. § 2254. In Petitioner's case, the statute of limitations runs from "the date on which the judgment [of conviction] became final by the conclusion of direct review or the

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mail system. *See Morales-Rivera v. United States*, 184 F.3d 109 (1st Cir. 1999).

expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The AEDPA also provides a statutory mechanism that tolls the limitations period. That provision excludes from the limitations period, "[t]he time during which a properly filed application for [s]tate post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2); *see also Neverson v. Bissonnette*, 261 F.3d 120, 125 (1st Cir. 2001). Since this Petition was filed on September 5, 2007, the Court's task is to determine the operative dates, as well as the tolling effect of Petitioner's State Court Motions.

The RISC affirmed Petitioner's conviction on February 29, 1996, and the judgment became final on March 12, 1996 upon the expiration of the ten-day period for filing a Motion for Reargument in State Court. Therefore, AEDPA's limitation period began to run upon the expiration of the ninety-day period for seeking a writ of certiorari from the United States Supreme Court pursuant to Sup. Ct. R. 13. According to the docket for the United States Supreme Court, Petitioner never filed a Petition for a Writ of Certiorari, and therefore the statute of limitations began to run on June 12, 1996, ninety days after the entry of judgment. Absent any tolling, therefore, Petitioner had until June 12, 1997 to file a timely federal habeas corpus petition under 28 U.S.C. § 2244(d)(1). Because his Petition was not filed until September 5, 2007 it is time-barred unless it was tolled by a "properly filed application for [s]tate

post-conviction or other collateral review" pursuant to 28 U.S.C. § 2244(d)(2).

Petitioner filed two Motions in State Court that are relevant to the Court's consideration of the limitations period. First, on May 16, 1996, Petitioner filed a Motion to Reduce Sentence pursuant to R.I. Super. Ct. R. Crim. P. 35(a). The Rule 35 Motion remained pending until January 16, 1998. *See State v. Kholi*, 706 A.2d 1326. Second, on May 23, 1997, while Petitioner's Rule 35 Motion was pending, he filed an application for post-conviction relief. That Motion remained pending until December 14, 2006. *See Kholi v. Wall*, 911 A.2d 262. There is no dispute that Petitioner's application for post-conviction relief tolled the statute of limitations. Thus, the Court must consider whether the Rule 35 Motion also tolled the limitations period. If Petitioner's Rule 35 Motion tolled the limitations period, then the current Petition filed on September 5, 2007 is timely. However, if Petitioner's Rule 35 Motion was not a properly filed "application for [s]tate post-conviction or other collateral review," the one-year period began to run on June 12, 1996 and continued until Petitioner filed his application for post-conviction relief almost a year later on May 23, 1997, at which point there were only twenty days remaining prior to the lapse of the one-year period. Thus, if the Rule 35 Motion does not toll the limitations period, the Petition is untimely, since Petitioner would have had to file any motion in Federal Court within twenty days of December 14, 2006, or until January 4, 2007.

Several Courts of Appeals have considered whether a motion to reduce sentence tolls the limitations period. *See Hartmann v. Carroll*, 492 F.3d 478, 482-484 (3rd Cir. 2007). This legal issue has not yet been directly addressed by the First Circuit Court of Appeals or this Court. Therefore, the Court has examined the Appeals Courts' decisions and R.I. Super. Ct. R. Crim. P. 35(a) to determine whether a motion to reduce sentence is a "properly filed application for [s]tate post-conviction or other collateral review" pursuant to 28 U.S.C. § 2244(d)(2). After a thorough review of the statute and the Appeals Court cases, this Court concludes that Petitioner's Rule 35 Motion to Reduce Sentence did not toll the one-year statute of limitations.

This Court finds persuasive the reasoning employed by the Third, Fourth and Eleventh Circuit Courts of Appeals which have found that State Court rules analogous to Rhode Island's Rule 35 did not toll the limitations period. In *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001), for example, the Fourth Circuit Court of Appeals stated that the "plain language interpretation" of 28 U.S.C. § 2244(d)(2) requires that it be limited to post-conviction review that is "collateral." *Id.* at 236. The court reasoned that a motion for correction or reduction of sentence contemplates the defendant returning to the same court, and pleading for mercy before the same judge that imposed the original sentence and thus, is not "collateral" within the meaning of AEDPA. *Id.* at 237-238. A Rule 35 proceeding, the Court noted, is

essentially part and parcel of the same proceeding in which the defendant was sentenced, and furthermore the motion does not allege any legal error, but is simply a "plea for leniency from a presumptively valid conviction." *Id.* at 238. *See also Hartmann*, 492 F.3d at 483 (noting that tolling for leniency motions does not promote exhaustion and finality of state court judgments by reducing the time in which federal review is sought); *Bridges v. Johnson*, 284 F.3d 1201, 1203 (11th Cir. 2002) (judicial review procedure for determining if a sentence is excessively harsh does not toll the AEDPA limitations period because it "does not promote exhaustion by giving state courts the opportunity to consider federal-law challenges to state court judgments, and it does not promote finality of state court judgments by reducing the time in which federal review is sought.")

The Tenth Circuit Court of Appeals has, on the other hand, held that the AEDPA limitations period is tolled by a motion for reduction of sentence under Colorado Rule of Criminal Procedure 35(b). *See Robinson v. Golder*, 443 F.3d 718, 720-721 (10th Cir. 2006) (noting that applications for state post-conviction relief should not be limited to those containing "constitutional challenges to the defendant's conviction."). The Tenth Circuit noted that comity dictated its holding, since State Court retains jurisdiction over a motion for leniency. The Third Circuit considered the Tenth Circuit's reasoning, and rejected it, noting that AEDPA "specifies that the section is tolled only by 'state post-conviction or other collateral

review' – not by just any pending state court proceeding." *Hartmann*, 492 F.3d at 483. After reviewing the language of the AEDPA and considering the purpose of its tolling provision, this Court finds the Third Circuit's interpretation of the AEDPA to be better reasoned and rejects the Tenth Circuit's finding as unpersuasive.

This Court's final task is to apply this reasoning to the text of Rule 35, as well as the Petitioner's Rule 35 Motion in State Court. R.I. Super. Ct. R. Crim. P. 35(a) provides that the Court "may correct an *illegal* sentence at any time" and that it "may reduce any sentence when a motion is filed within one hundred and twenty (120) days after sentence is imposed." R.I. Super. Ct. R. Crim P. 35(a). The 1972 Notes state: "[t]he provision permitting a reduction of a valid sentence is intended to provide the court with an opportunity during a limited period after sentencing to exercise leniency in the event the court, for some reason, determines that the sentence imposed was unduly severe or a shorter sentence would be desirable." After reviewing the Petitioner's Prebriefing Statement, which he submitted on appeal from the Superior Court's denial of his Rule 35 Motion, it is clear, as the State argues, that Petitioner's Motion to Reduce Sentence was a "plea of leniency," and not a motion challenging the legal sufficiency of his sentence. The Motion states, for example, "a motion to reduce is a plea for leniency, and the hearing judge may reduce a sentence if s/he

decides that the original sentence imposed was, for any reason, too severe." Document No. 10, Ex. 3.

This Court holds that Petitioner's Motion under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure was *not* a "properly filed application for post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), and therefore did not toll the limitations period. In *Duncan v. Walker*, 533 U.S. 167, 178-179 (2001), the United States Supreme Court explained that the exhaustion requirement "ensures that the state court have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." When a prisoner in State custody opts to file a motion that is a plea for leniency, the State is not being asked to correct legal errors. Whatever interest the State has in deciding the motion, its interest is not one in correcting errors before the Federal Courts assume jurisdiction. Moreover, if this Court was to hold that the Rule 35(a) Motion has the effect of tolling the limitations period of 28 U.S.C. § 2244(d)(1), it would create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic.

Conclusion

For the foregoing reasons, I recommend that the State's Motion to Dismiss (Document No. 4) be GRANTED, and that the Petition (Document No. 1)

be DISMISSED WITH PREJUDICE. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. *See* Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. *See United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
December 11, 2007

United States Court of Appeals
For the First Circuit

No. 08-1159

KHALIL KHOLI

Petitioner-Appellant

v.

A. T. WALL

Respondent-Appellee

Before

Lynch, *Chief Judge*,
Torruella, Selya, Boudin,
Lipez, Dyk,* and Howard,
Circuit Judges.

ORDER OF COURT

Entered: October 20, 2009

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and

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* Of the Federal Circuit, sitting by designation.

a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Chief Deputy Clerk

cc:
Christopher Robinson Bush
Miriam Conrad
Khalil Kholi
Judith H. Mizner
Aaron L. Weisman

Title 28, section 2244, of the United States Code provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United states if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application

that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear, in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

OPPOSITION BRIEF

QUESTION PRESENTED

Whether a state post-conviction motion seeking a discretionary reduction of sentence is an "application for State post-conviction or other collateral review" tolling the limitation period under 28 U.S.C. §2244(d)(1) for the filing of a federal petition for a writ of habeas corpus?

STATEMENT

Khalil Kholi, an individual in the custody of the State of Rhode Island, filed a pro-se petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of Rhode Island on September 5, 2007 (*Kholi v. Wall*, 582 F.3d 147, 150 (1st Cir. 2009).[1] The State of Rhode Island filed a motion to dismiss the petition on September 21, 2007, alleging that the petition was time-barred (*id.*).

As described in the First Circuit opinion, the United States district court found the following: Mr. Kholi's December 1995 convictions for first-degree sexual assault on his two stepdaughters and sentence to two consecutive life terms of imprisonment were affirmed on February 29, 1996 (*State v. Kholi*, 672 A.2d 429 (R.I. 1996)) (582 F.3d at 149). Mr. Kholi filed a Motion to Reduce Sentence pursuant to Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure on May 16, 1996. That motion was denied; the denial was affirmed by the Rhode Island Supreme Court on January 16, 1998 (*State v. Kholi*, 706 A.2d 1326 (R.I. 1998)) (582 F.3d at 149-150). On May 23, 1997 Mr. Kholi filed an application for post conviction relief pursuant to R.I. Gen. L. §10-9.1-1 in the Rhode Island Superior Court. That application was denied in April 2003; the denial was affirmed by the Rhode Island Supreme Court on December 14, 2006 (*Kholi v. Wall*, 911 A.2d 262 (R.I. 2006)) (582 F.3d at 150). The federal pro-se petition for a writ of habeas corpus was filed approximately nine months after the end of

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[1] The First Circuit opinion is appended to this opposition.

his efforts to obtain relief from his conviction and sentence in the state court (582 F.3d at 150).

In an Order entered on January 3, 2008 the United States District Court for the District of Rhode Island (Smith, U.S.D.J.) dismissed the petition with prejudice, finding that the motion to reduce sentence did not toll the limitations period of 28 U.S.C. §2254(d)(1). Judgment was entered on January 3, 2008 (582 F.3d 150). Kholi's request a certificate of appealability from the district court was denied on January 31, 2008 (*id.*).

On August 22, 2008 the United States Court of Appeals for the First Circuit granted a certificate of appealability and appointed counsel. After briefing and argument the court analyzed the language, structure and purpose of the federal statute (28 U.S.C. §2254(d)) and concluded that the motion to reduce sentence was a motion for "State post-conviction or other collateral review" within the meaning of 28 U.S.C. §2254(d)(2) which tolled the one year limitation period of 28 U.S.C. §2254(d)(1). It reversed the order of dismissal.

REASONS FOR DENYING THE WRIT

I. Review Should Await Further Development of the Issue in the Circuit Courts of Appeals

There is a conflict between the First and Tenth Circuits and the Third, Fourth and Eleventh Circuits as to whether a motion filed in state court for a discretionary reduction of sentence tolls the limitations period of 28 U.S.C. §2254(d)(1). The varied rationales underlying these opinions suggest that review of this issue should await further development by other circuits. Moreoever , it is not clear that the issue affects a significant number of the reportedly more than 1.4 million persons incarcerated in state prisons noted by petitioner (Pet.14).[2]

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[2] "Pet." refers to the Petition for Writ of Certiorari filed by Petitioner, A.T. Wall.

The three circuits that have held that a motion for a discretionary reduction of sentence is not a tolling event have employed different rationales and seven circuits have not addressed the question. The Fourth Circuit deemed such a motion to be not collateral in nature, defining collateral review as "a proceeding separate and distinct from that in which the original judgment was rendered , and in which the petitioner challenges the legality of the original judgment." *Walkowiak v. Haines*, 272 F.3d 234, 237 (4th Cir. 2001). While agreeing that the review requested must be collateral to toll the limitations period, the Third Circuit focused on the motion's relationship to issues of comity, finality and federalism. *Hartmann v. Carroll*, 492 F.3d 478 (3rd Cir. 2007). The Eleventh Circuit discussed the interests of finality and exhaustion, the absence of allegations of legal error in the motion for reduction, noted the Fourth Circuit's holding that such a motion was not "collateral", and found the "analyses and conclusions" of the Third and Fourth Circuits "consistent" with its conclusion. *Alexander v. Secretary, Dept. Of Corrections*, 523 F.3d 1291, 1299 (11th Cir. 2008).

In holding that a motion for a discretionary reduction of sentence is a tolling event, the Tenth Circuit construed the language of 28 U.S.C. §2254(d)(2) as not requiring that a motion contain a constitutional challenge. It defined a state motion for reduction of sentence as related to the pertinent judgment or claim. It also noted comity concerns. *Robinson v. Golder*, 443 F.3d 718 (10th Cir. 2006). The First Circuit first addressed the text of the statute and concluded its plain meaning favored the conclusion that the filing of a Rhode Island motion to reduce sentence was a tolling event. It then examined and rejected the analyses of the Third, Fourth and Eleventh Circuits and analyzed not only the impact of doctrines of finality and exhaustion but also the principles of comity and federalism. *Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009).

Resolution of the issue presented might benefit from further development of the issues in the seven circuits that have not yet addressed the issue not only because of the varied rationales of the existing opinions, but also because of the variations in state reduction of sentence provisions that could be candidates for tolling events. Some state provisions addressing a motion for discretionary reduction of sentence have time frames for filing generally running only from the imposition or commencement of service of sentence. *See e.g.* De.R.Super.Ct. RCRP Rule 35; IC 35-38-1-17; Tenn. R.Crim.P., Rule 35. Others run from the imposition of sentence and/or resolution of appeals and/or petitions for certiorari. *See e.g.* W.Va.R. Crim.P., Rule 35; Fla.R.Crim.P. Rule 3.800(c); SDCL §23A-31-1. Some require resolution as well as filing, within certain time frames. *See e.g.* N.D.R.Crim.P., Rule 35; N.J. R.Crim.P., Rule 3:21-10.; Pa.R.Crim.P. Rule 720. Some limit the class of defendants eligible for relief. *See e.g.* C.G.S.A. §53a-39; 22 Okl.St.Ann. §982a.

The petitioner also suggests that this case could serve as a vehicle for clarifying standards to apply in determining whether the myriad other types of state court pleadings are, or are not, "application[s] for State post-conviction or other collateral review." (Pet.16-17). This case analyzed one specific type of motion with defined characteristics. Other state pleadings will present different issues. A one size fits all approach is not appropriate.

II. The First Circuit Fully Considered and Properly Decided the Issue Presented

In addressing whether the motion for reduction of sentence pursuant to Rhode Island Superior Court Rule of Criminal Procedure 35(a) tolled the limitations period of 28 U.S.C. §2254(d)(1), the First Circuit began by examining the text of the relevant statutory provision – 28 U.S.C. §2254(d)(2) ("State post-conviction or other collateral review with respect to the

pertinent judgment or claim") – and concluded its plain language supported the conclusion that it tolled the limitations period. First, the "pertinent judgment" was the sentence. The motion "is obviously a motion that seeks state post-conviction review of that sentence. ... a sentence cannot be reduced without first being reexamined (*i.e.*, reviewed)." (*Kholi v. Wall*, 582 F.3d at 152). Second, Congress's choice of the word "review" rather than "challenge supported the conclusion that tolling was not limited to motions presenting a legal challenge to the judgment (*id.* at 153).

The First Circuit disagreed with the Fourth Circuit's analysis of the meaning of the words "post-conviction or other collateral review". Rather than limiting the scope of tolling to motions defined as collateral in the sense of being filed in a separate proceeding, the First Circuit concluded that that interpretation failed to give meaning to the word "or" and viewed the phrase "or other collateral review" as "*expand[ing]* the scope of the tolling provision to cover the entire gamut of state judicial procedures that are available for testing the pertinent conviction or sentence." (582 F.3d at 153)(emphasis in original). The court also noted that other state post-conviction motions deemed to toll the limitations period are heard by the trial judge (*id.* at 153-154). Finally, in terms of textual analysis, the court noted that the term "collateral" had other meanings equally applicable in the context of the statute (*id.* at 154 n.6).

Addressing the discerned purposes of the statute, as had the Third and Eleventh Circuits, the court came to different conclusions. The court examined the statutory purpose in light of this Court's indication in *Williams v. Taylor*, 529 U.S. 420, 436 (2000) "that Congress enacted the AEDPA 'to further the principles of comity, finality, and federalism.'" (582 F.3d at 154). It concluded that while finality was important, it was not an absolute interest, as indicated by the presence of the tolling provision and the requirement of 28 U.S.C. §2254(b)(1)(A) that a habeas

applicant exhaust available state court remedies before filing a federal application (*id.*). Nor was tolling for a state discretionary sentence reduction motion inconsistent with the exhaustion requirement, since the state motion"implicates no claim that is susceptible of exhaustion."(*id.* at 154-155). In the court's view the Third Circuit had failed to recognize that exhaustion and tolling are "separate and distinct" concepts (*id.* at 155). Finally, the court concluded that "principles of comity and federalism support tolling" (*id.*). In Rhode Island, the motion to reduce sentence is a proceeding separate from a direct appeal, which may be separately appealed. Without tolling, a defendant may be forced to file federally before the state court has concluded its review , and a federal court could be forced to review a state conviction while state proceedings are still ongoing. "That would be antithetic to the design that Congress had in mind." (*id.*). It could also lead to the filing of protective, and ultimately unnecessary or poorly framed, habeas petitions (*id.*). The state motion for reduction could, for example, eliminate sentencing claims that would otherwise be appropriate for federal habeas review.

Respondent submits that the analysis of the First Circuit thoroughly addressed all of the concerns raised in the decisions in the Third, Fourth, and Eleventh Circuits and came to the correct result.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

No. 09-868

In The
Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

AARON L. WEISMAN
Assistant Attorney General
Chief, Criminal Division
Appellate Unit

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
(401) 222-2995 (facsimile)
aweisman@riag.ri.gov

Attorneys for Petitioner A.T. Wall

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondent acknowledges the circuit split on the question of whether a sentence-reduction motion consisting of a plea for leniency tolls the one-year limitations period of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Br. in Opp. 2 ("There is a conflict between the First and Tenth Circuits and the Third, Fourth and Eleventh Circuits as to whether a motion filed in state court for a discretionary reduction of sentence tolls the limitations period of 28 U.S.C. § 2244(d)(1)."). [1] Respondent, moreover, also seems to recognize that the question presented is of practical importance to a state prisoner challenging her state-court judgment of conviction in a United States District Court pursuant to 28 U.S.C. § 2254. Br. in Opp. 3-4 (suggesting that resolution of the presented tolling question, within the seven circuits that have not yet addressed the issue, might be implicated by the particular state sentence-reduction provision under consideration). Respondent, however, argues that because the "[r]esolution of the issue presented might benefit from further development of the issues in the seven circuits that have not yet addressed the issue," certiorari is inappropriate. Br. in Opp. 3-4. Moreover, Respondent contends, because the rationales advanced by the five circuits that have considered, and

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[1] Indeed, the First Circuit itself began its analysis of the question presented by recognizing the "chiaroscuro backdrop" of the extant "circuit split[.]" *Kholi v. Wall*, 582 F.3d 147, 152 (1st Cir. 2009).

split on, the question presented have been "varied" (*id.* at 2), "review of this issue should await further development by other circuits." Br. in Opp. 2. Neither of these arguments is persuasive.[2]

First, it is difficult to conceive how "the development of the issues in the seven circuits that have not yet addressed the issue" (Br. in Opp. 3) could resolve the three-to-two circuit split. Even were Respondent not wrong that "the First Circuit ... came to the correct result" (*id.* at 6) on the question,[3] it seems rather improbable that the remaining circuits "yet [to have] addressed the issue" (*id.*) will, in due course, fall in line with the First Circuit's

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[2] There is also, in the Brief in Opposition, at least the suggestion that a three-to-two circuit split is too shallow to warrant review. Br. in Opp. 2 (noting that since the 1996 enactment of the AEDPA "only five circuits have confronted this issue"). As the Court this very Term, however, granted certiorari in an AEDPA, indeed a § 2244, case involving a circuit split no deeper than two to one (*see* Petition for Writ of Certiorari in *Magwood v. Patterson*, 09-158 (filed Aug. 4, 2009), at pp. 14-15 (asserting the existence of a two to one circuit split on the construction of the phrase "second or successive" of § 2244(b) of the AEDPA)), there should hardly be a colorable suggestion that a three-to-two circuit split, on the significant question as to whether a class of state court submissions qualify to toll the AEDPA's one-year limitations period, is too narrow to warrant review.

[3] As the State of Rhode Island explained in the petition for writ of certiorari, the below determination of the First Circuit Court of Appeals is erroneous, if for no other reason than that its reading of § 2244(d)(2) is difficult to square with certain pronouncements of this Court as to the meaning of that provision. *See* Pet. 18-22.

determination, against that of the Third, Fourth and Eleventh Circuits.[4] If those circuits do not reach unanimity on the question presented, the circuit split will only deepen, perpetuating and substantially exacerbating the existing circumstance whereby state prisoners in different circuits operate under a

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[4] Indeed, the First Circuit's reading of the phrase "State post-conviction . . . review" to embrace also *direct* review of the pertinent state court judgment or claim (*Kholi v. Wall*, 582 F.3d at 152-53) appears incongruent with panel opinions in at least two of the seven circuits which have not yet decided the question. *See Malcom v. Payne*, 281 F.3d 951, 958 (9th Cir. 2002) (stating that "we know that the statute – by referring to '*other* collateral review' (emphasis added) – uses the term 'State post-conviction . . . review' as simply one type of 'collateral review.' "); *Polson v. Bowersox*, 595 F.3d 873, 875 (8th Cir. 2010) ("Our Court has held that other forms of *collateral* review under Missouri's appellate procedure qualify for statutory tolling under § 2244(d)(2).") (emphasis added). And, very recently, an Eastern District of Louisiana United States Magistrate Judge, refusing to characterize as a § 2244(d)(2) tolling mechanism a state court submission complaining of access to a Louisiana Risk Review Panel leniency review, read the Fifth Circuit's decision in *Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002) (holding that an application for writ of mandamus did not qualify as a § 2244(d)(2) "application for State post-conviction or other collateral review") to support such determination. *Horne v. Caine*, No. Civ. A. 09-5509 (Feb. 24, 2010), 2010 WL 1332977 (E.D.La.), at *5. (The Magistrate Judge also cited with approval the Eleventh, Third, and Fourth Circuits' decisions in, respectively, *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008), *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007), and *Walkowiak v. Haines*, 272 F.3d 234, 239 (4th Cir. 2001), as against the First Circuit's *Kholi* decision. *Horne v. Caine*, No. Civ. A. 09-5509 (Feb. 24, 2010), 2010 WL 1332977 (E.D.La.), at *5.)

conflicting habeas corpus tolling calculus. And even if the remaining circuits "yet [to have] addressed the issue" (Br. in Opp. 3) *were* to construe the phrase "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), as did the First Circuit, a rather implausible eventuality (*see* footnote 4, *supra*), the very same question presented will continue to persist – only in the form of an even deeper and more entrenched circuit split. Awaiting "the development of the issues in the seven circuits that have not yet addressed the issue" (Br. in Opp. 3), then, could only serve to deepen the existing circuit split, and greatly perpetuate the circumstance whereby the availability of federal habeas corpus relief might depend solely upon the locale of a prisoner's state court judgment.

Second, even accepting Respondent's contention that the five circuits to have addressed the question presented have articulated "varied rationales" in support of their respective determinations (Br. in Opp. 3-4), that is hardly good reason to allow the geographical happenstance of a prisoner's state court judgment to determine the availability of federal habeas corpus review. In any event, Respondent's suggestion that there are numerous rationales underlying the opinions of the five circuits (Br. in Opp. 2), is inaccurate. There are, in fact, only two underlying rationales upon which the circuits are split: (1) The proper statutory interpretation of the phrase "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2); and (2) the

relevant policy considerations that should bear upon the question whether a state court sentence-reduction motion consisting of a plea for leniency qualifies as such an application.[5] With respect to the first issue, the First and Fourth Circuits disagree as to the proper textual interpretation of the phrase "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2). *See Kholi v. Wall*, 582 at 153-54 (analyzing and rejecting the "textual" reading and interpretation that the Fourth Circuit in *Walkowiak v. Haines*, 272 F.3d at 237-39, gave to § 2244(d)(2)). And as to the second, policy-based, issue of disagreement, the First Circuit was critical of the Eleventh and Third Circuits' singular focus, in, respectively, *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008), and *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007), upon "the AEDPA's discerned purposes [of] . . . encouraging the exhaustion of state remedies and safe-guarding the finality of state-court judgments" (*Kholi v. Wall*, 582 F.3d at 154), to the apparent exclusion of the AEDPA's competing "principles of comity and federalism" (*id.* at 154-55). The First Circuit thus emphasized the very same comity concerns which had animated the Tenth Circuit's holding, in *Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006), that a

---

[5] *See Kholi v. Wall*, 582 F.3d at 153 ("We are mindful that three of our sister circuits have concluded that pleas for leniency do not trigger the AEDPA's tolling provision. These courts have relied on *two* different lines of reasoning to reach that result.") (emphasis added).

sentence-reduction motion made pursuant to Colorado Rule of Criminal Procedure 35(b) qualifies as an "application for State post-conviction or other collateral review" under § 2244(d)(2). Plainly, then, the three-to-two circuit split on the question presented is grounded upon a disagreement with respect to the discrete issues of statutory interpretation and AEDPA policy, not upon any more numerous and varying rationales, or any "variations in state reduction of sentence provisions" (Br. in Opp. 4).[6]

To promote uniformity in the AEDPA's one-year statute of limitations tolling calculus, and to bring to an end the existing geographical disparity with respect to such calculation, this Court's resolution of the circuit conflict on the narrow question presented is warranted at this time.

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[6] Indeed, Rule 35 of the Delaware Rules of Criminal Procedure, providing in most relevant part that "[t]he court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed", and Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure, providing in most relevant part that "[t]he court may . . . reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed", are so analogous, that it is evidently untenable to suggest (Br. in Opp. 4) that the contradictory holdings of *Kholi v. Wall*, 582 F.3d at 152-53, considering R.I.R. Crim. P. 35, and *Hartmann v. Carroll*, 492 F.3d at 483-84, considering Delaware's comparable provision, might merely be attributable to "the variation[ ] in state reduction of sentence provisions" (Br. in Opp. 4).

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

AARON L. WEISMAN
Assistant Attorney General
Chief, Criminal Division
Appellate Unit

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
(401) 222-2995 (facsimile)

Attorneys for Petitioner A.T. Wall

JOINT APPENDIX

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No. 09-868

In The
Supreme Court of the United States

A T WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v

KHALIL KHOLI,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

PATRICK C LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag ri gov

Attorneys for Petitioner
A T Wall

JUDITH H MIZNER
FEDERAL DEFENDER OFFICE
51 Sleeper Street, 5th Floor
Boston, Massachusetts 02210
(617) 223-8061
judith_mizner@fd org

Attorney for Respondent
Khalil Kholi

Petition For Certiorari Filed January 19, 2010
Certiorari Granted May 17, 2010

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STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

State of Rhode Island

vs. CASE NO. P1923305A

KAHLIL M KHOLI

JUDGMENT OF CONVICTION
AND COMMITMENT

On this date, 02-28-94 came the attorney for the State, YOUNGS and the defendant who appeared in person and by counsel, namely ROBERT E MARRO before Judge WILEY

IT IS ADJUDGED that the defendant upon a PLEA of NOT GUILTY and after a VERDICT OF GUILTY of the offense(s) of:

COUNT 001 SEXUAL ASSAULT
IN 1ST DEGREE

TERM TO SERVE LIFE

INDEMNITY FUND
Amount $1,000.00

PROBATION FUND
Amount $3,000.00

COURT COSTS
Amount $149.30

Note: COUNTS 1-6 ARE CONCURRENT AS ARE COUNTS 7-10 IN ADDITION, THE SETS OF COUNTS ARE CONSECUTIVE

COUNT 002 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 003 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 004 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 005 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 006 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 007 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 008 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 009 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

COUNT 010 SEXUAL ASSAULT IN 1ST DEGREE

TERM TO SERVE LIFE

as charged in the INDICTMENT and the COURT having asked the defendant whether he/she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the COURT,

IT IS ADJUDGED that the defendant IS GUILTY as charged and convicted

The defendant has been advised of his/her right to appeal within twenty days to the Supreme Court, and of his/her right, if unable to pay the cost of an appeal, to apply for leave to be represented on appeal by the Public Defender or to appeal in forma pauperis.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment to the Proper Authority of the Adult Correctional Institutions and that the copy serve as the commitment of the defendant.

TRUE COPY
ATTEST

/s/ Claudia Porrazzo	/s/ Wiley, J	02-28-94
[asst] CLERK	JUSTICE, SUPERIOR COURT	DATE SER

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC *SUPERIOR COURT*

STATE OF RHODE ISLAND

VS *P1/92-3305A*

KHALIL KHOLI

MOTION TO REDUCE SENTENCE

(Filed May 16, 1996)

Now comes the defendant, Khalil Kholi, in the above-entitled matter, 120 days not having elapsed from February 29, 1996, the day of the Supreme Court decision, and

Prays that the sentence imposed with respect to the above matter be reduced in accordance with the provisions of Rule 35 of the Rules of Criminal Procedure of the Superior Court.

KHALIL KHOLI

By his Attorney,

/s/ Michael DiLauro
Michael A DiLauro
Assistant Public Defender

CERTIFICATION

I hereby certify that on May 14, 1996 I delivered a copy of the within Motion to defendant; and a copy to the Department of Attorney General, Providence, Rhode Island

/s/ Michael DiLauro

PLEASE TAKE NOTICE THAT THE WITHIN MOTION WILL BE HEARD ON MAY 24, 1996.

[Already scheduled for 6-24-96]

Gemma

706 A.2d 1326

Supreme Court of Rhode Island.
STATE of Rhode Island
v.
Khalil KHOLI
No. 97-439-C.A.

Jan. 16, 1998.

Aaron L. Weisman, Providence.

Paula Rosin, Providence.

ORDER

This matter is here on the defendant's appeal from the denial of his motion to reduce sentence filed pursuant to Super.R Crim.P. 35. After consideration of the prebriefing materials, this case was assigned to the full court for a session in conference in accordance with Rule 12A(3)(b) of the Supreme Court Rules of Appellate Procedure.

The defendant was convicted of ten counts of first-degree sexual assault of his two stepdaughters. He was sentenced to life imprisonment on each count, counts 1 through 6 to run concurrently with one another, but consecutively to counts 7 through 10. The defendant's conviction was affirmed by this court. *See State v. Kholi*, 672 A.2d 429 (R.I.1996).

On May 16, 1996, the defendant filed, in the Superior Court, a motion to reduce his sentence. The defendant's motion was heard by a justice who had not presided over his trial, because the trial justice

had retired. In his consideration of the defendant's motion, the hearing justice reviewed this court's decision affirming the defendant's conviction, as well as the sentencing hearing transcripts and letters submitted on the defendant's behalf. In addition, the hearing justice spoke with the retired trial justice to seek his guidance as to what he might do, upon reflection, if he were still a sitting judge. Thereafter, the hearing justice denied the defendant's motion to reduce his sentence.

The defendant now contends on appeal that it was inappropriate for the hearing justice to solicit the retired trial justice's opinion relative to the defendant's motion to reduce his sentence He argues that, in essence, it was the retired trial justice who decided the motion without the benefit of hearing the defendant's arguments.

We disagree with the defendant's contentions. The defendant in his motion to reduce his sentence was seeking to have the court reconsider its prior determination. He was asking the trial justice to order that his life sentences run concurrently. He was not alleging any change of circumstances since his sentencing.

The hearing justice, after conferring with the trial justice, reviewing the sentencing transcript, and after reviewing this court's decision, determined that the sentence imposed was appropriate. In so finding the trial justice committed no error of law. Moreover, given that the hearing justice did not either preside

over the trial or impose the sentence, it was entirely appropriate for the judge to confer with the trial justice. The motion to reduce sentence was addressed to the sound discretion of the trial justice and will not be disturbed absent a finding of an abuse of discretion. In the instant case, the facts clearly justify the defendant's sentence The evidence adduced at trial was that the defendant had repeatedly sexually abused his stepdaughters from ages five and seven, into their teens Therefore, we find no abuse of discretion by the hearing justice in declining to reduce defendant's sentence.

Consequently, the defendant's appeal is denied and dismissed. The denial of the motion to reduce sentence is affirmed.

BOURCIER, J , did not participate.

PETITIONER'S BRIEF

No. 09-868

Supreme Court, U.S.
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In The
Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S BRIEF

PATRICK C. LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L. WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R. BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag.ri.gov

Attorneys for Petitioner
A.T. Wall

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas corpus petition?

PARTIES TO THE PROCEEDING

Khalil Kholi was the petitioner and appellant in the courts below and is the Respondent in this Court. The Rhode Island Department of Attorney General was, by order of the district court, and on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, the designated respondent and appellee in the courts below, and is the Petitioner in this Court.

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BRIEF FOR PETITIONER

Rhode Island Attorney General Patrick C. Lynch, on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the First Circuit that reversed the United States District Court for the District of Rhode Island's judgment dismissing as time-barred Respondent's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus.

OPINIONS BELOW

The report and recommendation of the United States Magistrate Judge dated December 11, 2007, and entered on December 12, 2007, is not reported. Pet. App. 22-31.[1]

The order of the United States District Court for the District of Rhode Island, dated December 28, 2007, and entered on January 3, 2008, adopting the report and recommendation is not reported. Such order, however, as well as the magistrate judge's report and recommendation, is available at 2008 WL 60194 (D.R.I. Jan. 3, 2008). Pet. App. 21.

The panel opinion of the United States Court of Appeals for the First Circuit, dated September 23,

[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed on January 21, 2010.

2009, is officially reported at 582 F.3d 147 (1st Cir. 2009). Pet. App. 2-20.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit entered on September 23, 2009. Pet. App. 1. The Court of Appeals entered an Order denying a timely motion for rehearing *en banc* on October 20, 2009. Pet. App. 32-33. The Petition For Writ Of Certiorari was filed on January 19, 2010, and granted on May 17, 2010. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND PROCEDURAL RULE INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), in particular, the portion codified at 28 U.S.C. § 2244(d), provides in pertinent part:[2]

[2] Title 28, Section 2244, of the United States Code is set forth in its entirety in the Appendix to the Petition For Writ Of Certiorari. Pet. App. 34-37.

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) Pet. App. 36-37.

Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed, or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. The court shall act on the motion within a reasonable time, provided that any delay by the court in ruling on the motion shall not prejudice the movant. The court may reduce a sentence, the execution of which has been suspended, upon revocation of probation.

R.I.R. Crim. P. 35(a).

STATEMENT OF THE CASE

A Providence County, Rhode Island, petit jury convicted Khalil Kholi on December 15, 1993, of having committed ten counts of first degree sexual assault (in violation of R.I. Gen. Law § 11-37-2) upon

his two stepdaughters. *See State v Kholi*, 672 A.2d 429, 431 (R.I. 1996). The trial justice, on February 28, 1994, cumulatively sentenced Mr. Kholi for these crimes to two sentences of life imprisonment at the Rhode Island Adult Correctional Institutions. *See id.* Almost two years to the day later, on February 29, 1996, the Rhode Island Supreme Court affirmed Mr. Kholi's judgment of conviction on direct appeal. *See id.* at 437. Mr. Kholi neither petitioned the Rhode Island Supreme Court to reargue his appeal, nor this Court for the issuance of a writ of certiorari. Pet. App. 4.

On May 16, 1996, some ten weeks subsequent to the Rhode Island Supreme Court's affirmance of Mr. Kholi's judgment of conviction, Mr. Kholi filed in the Rhode Island Superior Court a "Motion To Reduce Sentence" "in accordance with the provisions of Rule 35 of the Rules of Criminal Procedure of the Superior Court." Joint App. 8-9. That motion was ultimately, after due consideration by a Rhode Island Superior Court Justice, *see State v. Kholi*, 706 A.2d 1326 (R.I. 1998), denied on August 27, 1996, and that denial was, in turn, affirmed on appeal by the Rhode Island Supreme Court on January 16, 1998, in a brief *Order* in which the court held, in most relevant part, that Mr. Kholi's lengthy sentence was "justif[ied]" given "[t]he evidence adduced at trial that [Mr. Kholi] . . . had repeatedly sexually abused his stepdaughters from ages five and seven, into their teens." *State v. Kholi*, 706 A.2d 1326, 1326 (R.I. 1998) (mem.).

On May 23, 1997, while Mr. Kholi's appeal of the Superior Court's denial of his "Motion to Reduce Sentence" was pending, he filed in the Rhode Island Superior Court an application for post-conviction relief ("PCR Application") pursuant to Title 10, Chapter 9.1 of the Rhode Island General Laws, a chapter entitled "Post Conviction Remedy." Joint App. 2. This post-conviction relief action ultimately went to hearing on Mr. Kholi's contention that his judgment of conviction should be vacated because (1) he had received, in derogation of the Sixth Amendment, ineffective assistance of trial counsel, and (2) "newly discovered" evidence revealed that the Superior Court had erroneously excluded from his trial evidence of victim-bias. *See Kholi v. Wall*, 911 A.2d 262, 264-65 (R.I. 2006). Both of these claims were, in due course, rejected by the Superior Court, which entered judgment denying Mr. Kholi's PCR Application on April 23, 2003. *See id.* at 264. The Rhode Island Supreme Court affirmed this judgment on December 14, 2006. *See id.* at 266.

On September 5, 2007, nearly nine months after the Rhode Island Supreme Court affirmed the Superior Court's denial of Mr. Kholi's PCR Application, Mr. Kholi filed in the United States District Court for the District of Rhode Island a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging on a number of grounds his state court judgment of conviction. Joint App. 3. The Attorney General for the State of Rhode Island, on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, and

as designated respondent, moved to dismiss Mr. Kholi's habeas corpus petition on the ground that it was barred by the one-year limitations period in 28 U.S.C. § 2244(d)(1).[3] Joint App. 3; Pet. App. 5.

On December 12, 2007, the United States Magistrate Judge to whom the district court referred the State's motion to dismiss, submitted a report and recommendation recommending the dismissal of Mr. Kholi's habeas petition with prejudice. Pet. App. 5. The magistrate judge determined that, since more than eleven years elapsed between the date on which Mr. Kholi's state court convictions became final – May 28, 1996,[4] and the date on which Mr. Kholi filed the

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[3] Title 28, Section 2244(d)(1) of the United States Code provides, in relevant part, that:

> [A] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

[4] Since the Rhode Island Supreme Court affirmed Mr. Kholi's judgment of conviction on February 29, 1996, his judgment of conviction became "final" pursuant to § 2244(d)(1) ninety days later, on May 28, 1996, when his time for filing a petition for writ of certiorari with this Court elapsed. *See Jimenez v. Quarterman*, 555 U.S. ___, 129 S. Ct. 681, 685, 172 L. Ed. 2d 475 (2009); Sup. Ct. R. 13 (indicating that a party has ninety days from entry of judgment in which to request a petition for a writ of certiorari).

The magistrate judge had actually determined that Mr. Kholi's judgment of conviction became final on June 12, 1996, fifteen days later than it actually did (*see* Pet. App. 25). This

(Continued on following page)

habeas petition – September 5, 2007, Mr. Kholi's petition would be time-barred unless the limitations period had been sufficiently tolled. Pet. App. 6. There was no dispute that Mr. Kholi's 1997 PCR Application tolled the limitations period from May 23, 1997, when Mr. Kholi filed it in the Rhode Island Superior Court, until December 14, 2006, when the Rhode Island Supreme Court affirmed the Superior Court's denial of Mr. Kholi's PCR Application;[5] nor was there any dispute that if Mr. Kholi's "Motion To Reduce Sentence" did not also toll the limitations period from the date on which Mr. Kholi filed it – May 16, 1996, until the date on which he filed the PCR Application – May 23, 1997, Mr. Kholi's habeas petition would be untimely. Pet. App. 7.

The magistrate judge, embracing the holdings of three federal circuit courts of appeals, *see Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008); *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007); *Walkowiak v. Haines*, 272 F.3d 234, 239

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miscalculation was predicated on the mistaken premise, suggested by the State, that the time for seeking a writ of certiorari began to run only after the expiration of the period Mr. Kholi had to seek re-argument of his direct appeal in the Rhode Island Supreme Court. Of course, the fifteen-day difference between the May 28, 1996, and June 12, 1996, dates has no impact on the timeliness of Mr. Kholi's habeas petition.

[5] A habeas petitioner is not entitled to further statutory tolling for the period available to file a petition for writ of certiorari to this Court following state collateral review, even if the petition for writ of certiorari is actually filed. *Lawrence v. Florida*, 549 U.S. 327, 333-34 (2007).

(4th Cir. 2001), and rejecting as "unpersuasive" the contrary reasoning of a fourth, *see Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006), concluded that Mr. Kholi's "Motion under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure was *not* a 'properly filed application for post-conviction or other collateral review' under 28 U.S.C. § 2244(d)(2), and therefore did not toll the limitations period." Pet. App. 30 (emphasis in original). The magistrate judge explained as follows:

> When a prisoner in State custody opts to file a motion that is a plea for leniency, the State is not being asked to correct legal errors. Whatever interest the State has in deciding the motion, its interest is not one in correcting errors before the Federal Courts assume jurisdiction. Moreover, if this Court was to hold that the Rule 35(a) Motion has the effect of tolling the limitations period of 28 U.S.C. § 2244(d)(1), it would create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic.

Pet. App. 30.

The district court accepted, over Mr. Kholi's objection, the magistrate judge's report and recommendation, and dismissed with prejudice Mr. Kholi's habeas petition. Pet. App. 23. Judgment for the State entered that same day. *Id.*

On August 22, 2008, the United States Court of Appeals for the First Circuit granted Mr. Kholi's *pro se* application for a certificate of appealability, and

invited further briefing on the following issue: "Whether a post-conviction motion to reduce sentence, that seeks merely discretionary leniency and does not challenge the legality of the sentence or conviction, acts as a state tolling mechanism under 28 U.S.C. § 2244(d)(2)." Joint App. 3; Pet. App. 6.

Following full briefing and oral argument by the parties,[6] a panel of the First Circuit, on September 23, 2009, reversed the district court's determination that Mr. Kholi's Rule 35 motion did not preserve the timeliness of his federal habeas corpus petition. *See Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009).[7] Although

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[6] The First Circuit's August 22, 2008, Order granting the certificate of appealability had also directed the clerk's office to appoint the Federal Public Defender's Office to represent Mr. Kholi before it. Joint App. 3; Pet. App. 6.

[7] Before reaching the Rule 35 tolling question, the panel took up Mr. Kholi's argument, not advanced by him in the district court, that a *second* post-conviction relief application he had filed, on October 18, 2005, in the Rhode Island Superior Court (Joint App. 2) – some fourteen months prior to the Rhode Island Supreme Court's December 14, 2006, affirmance of the Rhode Island Superior Court's denial of Mr. Kholi's *first* PCR Application – as well tolled the one-year limitations period, thus making Mr. Kholi's federal habeas corpus application timely, irrespective of tolling for his Rule 35 motion. Rejecting this alternate tolling contention, the *Kholi* panel determined that because the second post-conviction relief application merely challenged the State of Rhode Island's calculation of Mr. Kholi's parole eligibility date, it was not "directed to 'the pertinent judgment or claim,'" and, so, was "devoid of any effect on the limitations period within which [Mr. Kholi] . . . had to seek federal habeas relief." (*Kholi*, 582 F.3d at 151 (*quoting* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application

(Continued on following page)

the panel "agree[d] with the district court's characterization of [Mr. Kholi's] . . . Rule 35(a) motion as a plea for leniency, simpliciter" that in no way "challenge[d] the *legality* of the sentence," *Kholi*, 582 F.3d at 152-53 (emphasis in original), and (citing to *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d at 1297; *Hartmann v. Carroll*, 492 F.3d at 483-84; and *Walkowiak v. Haines*, 272 F.3d at 239) acknowledged that the district court's "view" had "impressive support in the case law," the panel nevertheless determined that "State post-conviction or other collateral *review*" was *not* "limit[ed] . . . to motions that *challenge the legal* basis of the pertinent judgment," *Kholi v. Wall*, 582 F.3d at 153 (emphasis added). "[W]e deem it significant," the panel continued, that:

> [I]n drafting section 2244(d)(2), Congress employed the expansive term "review" instead of a more confining term (such as "challenge"). The latter terminology would have been a natural fit had Congress wished to focus the tolling provision more narrowly.
>
> In contrast, "review" commonly denotes "a looking over or examination with a view to amendment or improvement." Webster's Third New International Dictionary 1944 (2002); *see also* Black's Law Dictionary 1345 (8th ed. 2004) (defining "review" as the

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for State post-conviction or other collateral review *with respect to the pertinent judgment or claim* is pending shall not be counted toward any period of limitation under this subsection.") (emphasis added)).

> "[c]onsideration, inspection, or reexamination of a subject or thing"). Taking into account this quotidian understanding, it seems self-evident that a motion for a sentence reduction in the nature of a plea for discretionary leniency is a motion that seeks post-conviction "review" of a sentence and, thus, is a motion that falls squarely within the plain meaning of section 2244(d)(2).

Kholi, 582 F.3d at 153.

The panel then addressed the contrary determination reached by three of its sister circuits,[8] beginning with the Fourth Circuit's *Walkowiak* opinion, in which the court had read the phrase "State post-conviction or *other* collateral review" (§ 2244(d)(2) (emphasis added)) to mean that "the applicable one-year statute of limitations is tolled only for state *collateral*, post-conviction review." *Walkowiak*, 272 F.3d at 236 (emphasis in original). Because the West Virginia sentence-reduction motion at issue in *Walkowiak* (1) was "part and parcel of the original [sentencing] proceeding," and (2) did not "entail a *challenge to the legality* of the earlier proceeding or judgment," the Fourth Circuit concluded "that such a proceeding is not 'collateral' within the meaning of § 2244(d)(2) and therefore that the one-year statute of

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[8] Although not discussed, the *Kholi* panel, at 582 F.3d at 152, did reference the Tenth Circuit's *per curiam* opinion in *Robinson v. Golder*, 443 F.3d at 720-21, in which the court held that a sentence-reduction motion filed under Colorado law did toll the AEDPA's one-year limitations period.

limitations period in that provision is not tolled during the pendancy of such proceeding." *Walkowiak*, 272 F.3d at 237-39 (emphasis added).

Disagreeing with this analysis, the *Kholi* panel stated that by "[c]onflating the two halves of the phrase 'State post-conviction or other collateral review' to mean exclusively 'collateral, post-conviction review,'" the Fourth Circuit had "read . . . the word 'or' completely out of the statute." *Kholi*, 582 F.3d at 153-54. Reading § 2244(d)(2) properly, the *Kholi* panel continued, permits tolling for even *non*-collateral state court post-conviction applications. *Kholi*, 582 F.3d at 154. Concluding its critique of the *Walkowiak* line of reasoning, the *Kholi* panel determined that whether or not Mr. Kholi's sentence reduction motion was collateral, it qualified as an "application for State post-conviction . . . review."[9] *Id.*

Turning to the Third Circuit's decision in *Hartmann*, holding that "a plea for leniency, directed toward the sentencing court, . . . seek[ing] discretionary relief based on mercy and grace, rather than on the law" was not a "State post-conviction or other collateral review" application, *Hartmann*, 492 F.3d at 483, and the Eleventh Circuit's decision in *Alexander*, holding that a sentence reduction motion that only

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[9] Because the *Kholi* panel held that Mr. Kholi's Rule 35 motion was (whether collateral or not) an application for "State post-conviction . . . review" (§ 2244(d)(2)), it had no need to determine whether such motion also qualified as "other collateral review[.]" *Kholi*, 582 F.3d at 154 n.6.

"request[s] leniency from the sentencing court based on mitigating circumstances," is not an "application for State post-conviction or other collateral review," *Alexander*, 523 F.3d at 1295, the *Kholi* panel explained that it could not subscribe to the policy-based reasons advanced in those decisions, because tolling during the time in which a state prisoner pursues even a purely discretionary sentence-reduction motion presents no "insult" to the AEDPA's "exhaustion requirement," and advances the AEDPA's concern that federal habeas corpus review take place only upon the conclusion of the state direct and collateral review process. *Kholi*, 582 F.3d at 154-56; Pet. App. 14-18.

The First Circuit concluded its opinion by reiterating its holding "that a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of 28 U.S.C. § 2244(d)(2)." *Kholi*, 582 F.3d at 156. As a consequence, the *Kholi* panel reversed the district court's order of dismissal and remanded the case for further proceedings. *Id.*

The Court of Appeals denied the Attorney General's motion for rehearing and rehearing *en banc* on October 20, 2009. Pet. App. 32. This Court granted Certiorari on May 17, 2010.

SUMMARY OF THE ARGUMENT

Title 28, Section 2244(d)(2) of the United States Code provides that the one-year limitations period, applicable to petitions for federal habeas corpus filed pursuant to 28 U.S.C. § 2254, is tolled by the submission in state court of "a properly filed application for State post-conviction or other collateral review." The question presented is whether a state court sentence-reduction motion consisting of a plea for leniency constitutes such a tolling application.

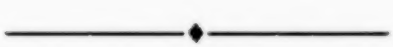
This Court should hold that a motion for discretionary sentence reduction does not qualify as an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2). The plain language of this statute establishes that only state applications seeking "collateral review" of judgments of criminal conviction or sentence toll the one-year limitations period of 28 U.S.C. § 2244(d)(1). As for the meaning of State "collateral review" applications, the consistent manner in which this Court has employed the term "collateral review" in its decisions, the established meaning that the term *federal* collateral review has, and the way Congress used the term in other subsections of § 2244, establish that Congress understood and intended applications for "collateral review" to refer only to state court filings that challenge and/or otherwise seek to invalidate a final judgment of conviction or sentence.

This interpretation of § 2244(d)(2), confining "collateral review" applications to those that challenge the validity of an already final judgment of conviction

or sentence, most appropriately balances and advances the sometimes competing interests that the AEDPA is intended to promote – finality of state court judgments, and exhaustion of state court remedies – and properly accounts for why Congress employed the expansive phrase "State post-conviction or other collateral review" in the first place. This construction of the phrase, as well, finds broad support in the decisions of the United States Courts of Appeals.

Accordingly, the First Circuit's dictionary-predicated interpretation of § 2244(d)(2), to provide tolling for essentially *any* properly filed application that requires a state court to "look at" a judgment of conviction or sentence, is irreconcilable with the intended meaning of "collateral review," and otherwise undermines the interests that the AEDPA is designed to advance. Tolling the AEDPA's limitations period for discretionary sentence-reduction motions, then, undermines the interest in the finality of state court judgments, while doing no service to the exhaustion of state remedies doctrine.

Accordingly, this Court should reverse the decision of the United States Court of Appeals for the First Circuit, which vacated the district's court's dismissal of Mr. Kholi's petition for writ of habeas corpus.



ARGUMENT

I. The Phrase "Application For State Post-Conviction Or Other Collateral Review" In 28 U.S.C. § 2244(d)(2) Was Meant To Refer Only To State Applications That Seek To Invalidate Or "Attack" An Otherwise Final Judgment Of Conviction Or Sentence.

"In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction." *Mayle v. Felix*, 545 U.S. 644, 654 (2005). This "tight time line," "enacted . . . to advance the finality of criminal convictions," consists of "a one-year limitation period ordinarily running from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,' 28 U.S.C. § 2244(d)(1)(A)."[10] *Mayle*, 545

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[10] Title 28, Section 2244(d)(1), of the United States Code, in its entirety provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(Continued on following page)

U.S. at 662. This one-year limitations period is tolled, however, for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . " 28 U.S.C. § 2244(d)(2).

The issue before the Court is whether a state court sentence-reduction motion consisting of a plea for leniency constitutes an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), so as to toll the one-year time period a state prisoner has, from when his or her judgment of conviction becomes final, to file a federal habeas corpus petition.

"The starting point for [this Court's] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739 (1989). Readily apparent from the plain language of § 2244(d)(2), is that "post-conviction . . . review" is one

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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

With respect to capital cases, Congress enacted a separate, shorter limitations period, which may be invoked upon a determination that a capital-sentencing state has met certain appointment-of-counsel prerequisites. *See* 28 U.S.C. §§ 2261, 2263.

type of "collateral review." The use of the correlative adjective "other" before "collateral review" serves to link "post-conviction . . . review" with the term "collateral review," such that "post-conviction . . . review" must be interpreted as one species, a particular kind or denomination, of "collateral review." Moreover, the disjunctive/conjunction "or," when coupled with the correlative adjective "other," even more strongly indicates that "an application for State post-conviction . . . review" is *one* type of application for State "collateral review." *See Malcom v. Payne*, 281 F.3d 951, 958 (9th Cir. 2002) ("[W]e know that the statute – by referring to '*other* collateral review' (emphasis added) – uses the term 'State post-conviction . . . review' as simply one type of 'collateral review.'") (emphasis in original); *Walkowiak*, 272 F.3d at 236 ("[U]nder the plain language of section 2244(d)(2) – 'State post-conviction or *other* collateral review' (emphasis added) – the applicable one-year statute of limitations is tolled only for state collateral, post-conviction review.") (second emphasis deleted) (*citing Duncan*, 533 U.S. at 176-77).

While the plain language of § 2244(d)(2) indicates that "post-conviction . . . review" is one type of "collateral review," the statute does not specifically define what the term "collateral review" itself means. *See Pace v. DiGuglielmo*, 544 U.S. 408, 421 (2005) ("The

words 'properly filed application for . . . collateral review' are not defined in AEDPA.").[11] There are a number of reasons, however, why the term "collateral review" should be interpreted to mean a proceeding at which a state prisoner seeks to upset an otherwise final judgment of conviction or sentence.

First, it is "a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the

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[11] Indeed, because § 2244(d)(2)'s operative words are left undefined, this Court has had to resolve a number of questions regarding their meaning. *See Artuz v. Bennett*, 531 U.S. 4 (2000) (holding that state post-conviction or other collateral review application is "*properly* filed" when its delivery and acceptance are in compliance with the applicable state laws and rules governing filings, and that state post-conviction or other collateral review application containing procedurally barred state law claims may nonetheless be deemed "properly filed") (emphasis added); *Duncan v. Walker*, 533 U.S. 167 (2001) (holding that *federal* habeas corpus application is not "application for . . . *other* collateral review") (emphasis added); *Carey v. Saffold*, 536 U.S. 214 (2002) (deciding that the word "pending" as used in § 2244(d)(2) covers the time between a lower state court's post-conviction or other collateral review decision, and the filing of a notice of appeal to a higher state court); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) (holding that state post-conviction petition that is rejected by state court as untimely under state statute of limitations, does not constitute a "*properly* filed" state post-conviction or other collateral review application) (emphasis added); *Lawrence v. Florida*, 549 U.S. 327 (2007) (deciding that "application for State post-conviction or other collateral review" is not "pending" while this Court considers a state prisoner's certiorari petition).

established meaning of these terms.'" *Neder v. United States*, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)).[12] In enacting § 2244(d)(2), it must be presumed that Congress was fully aware that when this Court used the term "collateral review" with respect to a state court proceeding, it did so, uniformly and evidently, to mean a collateral proceeding that *challenges* the

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[12] *See also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("It is not only appropriate but also realistic to presume that Congress was thoroughly familiar with our precedents . . . and that it expects its enactments to be interpreted in conformity with them.") (internal quotation marks and brackets omitted); *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("Though dictionaries sometimes help in [determining the meaning of statutory terms] . . . , we believe it more important here to look to the common law, which, over the years, has given to [such] terms . . . a legal meaning to which, we normally presume, Congress meant to refer."); *Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.") (internal quotation marks omitted); *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("The Court acknowledges, as it must, the doctrine that when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs."); *United States v. Arizona*, 295 U.S. 174, 189 (1935) ("When the Recovery Act was passed, the phrases 'adopted by the Congress' and 'recommended by the Chief of Engineer,' when used in acts of Congress relating to river and harbor improvements, had well understood and definite technical meanings."); *Smith v. Bowersox*, 159 F.3d 345, 347 (8th Cir. 1998) ("When Congress elects to use terminology that has become commonplace in court decisions in a particular field of law, the rules of statutory construction call for us to define the statute's terms in harmony with that accepted judicial meaning.").

lawfulness of a prior judgment of conviction or sentence. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 739, 755, (1991) (using term "collateral review" to refer to state court proceeding at which a federal habeas corpus claim may be raised, and stating that "state *collateral review* is the first place a prisoner can present a *challenge* to his conviction") (emphasis added); *Schad v. Arizona*, 501 U.S. 624, 628-29 (1991) ("Petitioner was convicted and sentenced to death, but his conviction was set aside on *collateral review*.") (emphasis added); *Parker v. Dugge*, 498 U.S. 308, 311 (1991) ("Parker pursued state *collateral review* without success, and then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida.") (emphasis added); *Jones v. Barnes*, 463 U.S. 745, 748 (1983) ("[R]espondent filed two more *challenges* in state court," one of which was "a motion in the trial court for *collateral review* of his sentence.") (emphasis added); *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974) (listing, among the available state procedures that could be used to remedy "*wrongful* [prosecutorial] conduct," state "post-conviction *collateral review*") (emphasis added); *Engle v. Isaac*, 456 U.S. 107, 124 n.28 (1982) (noting that "Respondents . . . long ago completed their direct appeals," and that "Ohio, moreover, provides only limited *collateral review* of convictions[.]") (emphasis added); *Castille v. Peoples*, 489 U.S. 346, 348 (1989) (Court would not "mandate *recourse* to *state collateral review*") (emphasis added); *Murray v. Carrier*, 477 U.S. 478, 481 (1986) (referring to "state habeas corpus" proceeding as "collateral review"); *Shea v. Louisiana*, 470 U.S. 51, 58 n.4 (1985) (referring to

state court that "should *rectify* the [constitutional trial] *error*" as "court conducting *collateral review*") (emphasis added); *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("On state *collateral review*, the trial court denied *relief*, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence.") (emphasis added); *Lockhart v. Nelson*, 488 U.S. 33, 36 (1988) ("State courts *upheld* the enhanced sentence on both direct and *collateral review*") (emphasis added); *Florida v. Burr*, 496 U.S. 914, 915 (1990) (Stevens, J., dissenting) ("Thereafter, in state *collateral review* proceedings, respondent sought to *set aside* his conviction[.]") (emphasis added); *Wainwright v. Sykes*, 433 U.S. 72, 115 (1977) (Brennan, J., dissenting) ("The federal criminal system . . . relies on the belated *correction of error*, through appeal and *collateral review*, to ensure the fairness and legitimacy of the criminal sanction.") (emphasis added); *Rector v. Bryant*, 501 U.S. 1239, 1243 n.2 (1991) (Marshall, J., dissenting) ("For if a prisoner is incapable of recognizing or communicating facts that would facilitate *collateral review*, there is no reason to assume that *collateral review* in his case has rooted out all trial *errors*.") (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (Powell, J., concurring in part and concurring in the judgment) (with regard to the execution of the criminally insane, "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both *state* and federal *collateral review*") (emphasis added).

Given, then, that this Court, prior to the AEDPA's enactment, had repeatedly used, in the context of state court proceedings, the term "collateral review" to mean established state court vehicles for challenging judgments of conviction or sentence,[13] Congress should be presumed to have intended that meaning in drafting § 2244(d)(2).[14] *See Panetti v.*

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[13] Indeed, *since* the enactment of the AEDPA, this Court has continued to use the term "collateral review" in precisely this same way. *See, e.g., Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (stating that there is "no . . . rule of federal law" which "limits state *collateral review* courts' authority to provide *remedies for federal constitutional violations*") (emphasis added); *Smith v. Texas*, 550 U.S. 297, 300 (2007) ("Smith, on state *collateral review*, continued to *seek relief* based on the inadequacy of the special issues, arguing that the nullification charge had not *remedied* the problem identified in his pretrial objection.") (emphasis added); *Evans v. Chavis*, 546 U.S. 189, 192 (2006) ("California, however, has a special system governing appeals when prisoners seek *relief* on *collateral review*.") (emphasis added); *Daniels v. United States*, 532 U.S. 374, 382 (2001) (referencing state "collateral review" as avenue to challenge a prior conviction); *Lindh v. Murphy*, 521 U.S. 320, 323 (1997) (stating that Lindh had not pursued his "Confrontation Clause" "claim[ ]" on "state *collateral review*") (emphasis added).

[14] Further confirmation is found in the fact that this Court has repeatedly referred to State "post-conviction review" – a species of collateral review (*supra* at 18-20) – to, as well, mean an established state court collateral vehicle for challenging judgments of conviction or sentence. *See, e.g., Polk County v. Dodson*, 454 U.S. 312, 324 (1981) (noting that Iowa's "postconviction review" vehicle is among the "burgeoning . . . postconviction *remedies*," and that such vehicle affords "the extension of legal assistance") (emphasis added); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (discussing the raising of legal issues, in North Carolina, pursuant to "post-conviction review" provision); *Wainwright v. Witt*, 469 U.S. 412, 415 (1985) (referencing Florida state prisoner's

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Quarterman, 551 U.S. 930, 943-44 (2007) ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the . . . AEDPA[.]").

Second, it is well established that the term "collateral review" in the *federal* context, be it a challenge by a *state* prisoner in a § 2254 action, or a *federal* prisoner seeking relief in a § 2255 proceeding, means, by its very nature, an *attack* upon an otherwise final judgment – indeed, not just any attack, but one premised on lack of jurisdiction, constitutional error, or an error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice. *See United States v. Timmereck*, 441 U.S. 780, 783-84 (1979); *Hill v. United States*, 368 U.S. 424, 428 (1962); 28 U.S.C. § 2254 (predicating, in relevant part, federal habeas corpus relief on "ground that [state prisoner] . . . is in custody in violation of the

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unsuccessful effort to challenge his first-degree murder conviction in state "postconviction review" proceeding); *Murray v. Carrier*, 477 U.S. 478, 490 (1986) (discussing requirement that a Virginia state convict "raise his *legal claims* on appeal rather than on postconviction review") (emphasis added); *Pennsylvania v. Finley*, 481 U.S. 551, 557-59 (1987) (referencing Pennsylvania "postconviction review" proceeding at which "State chooses to offer help to those *seeking relief* from convictions") (emphasis added); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (discussing procedural default with respect to the raising of constitutionally cognizable claims in Florida "postconviction review" proceeding); *Victor v. Nebraska*, 511 U.S. 1, 18-19 (1994) (referencing the "postconviction review" undertaken by the Nebraska Supreme Court on a due process challenge to a jury instruction).

Constitution"); 28 U.S.C. § 2255 (remedy for "prisoner . . . under [federal] sentence" to challenge conviction or sentence on constitutional or jurisdictional grounds).[15] "[H]abeas corpus always has been a collateral remedy, providing an avenue for *upsetting* judgments that have become otherwise final." *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (emphasis omitted and added). Given this well-recognized definition of *federal* "collateral review," it would be incongruous to posit that Congress intended to define *state* "collateral review" differently when employing precisely that same term in § 2244(d)(2).

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[15] *See also United States v. Addonizio*, 442 U.S. 178, 184-85 (1979) ("When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and *collateral review*. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.") (footnotes omitted; emphasis added); *Stone v. Powell*, 428 U.S. 465, 478 n.10 (1976) ("Even those nonconstitutional claims that could not have been asserted on direct appeal can be raised on [§§ 2254, and 2255] *collateral review* only if the alleged error constituted a fundamental defect which inherently results in a complete miscarriage of justice.") (emphasis added) (internal quotation marks omitted); *Costarelli v. Massachusetts*, 421 U.S. 193, 199 (1975) ("habeas corpus is traditionally thought of as a 'collateral attack' on a judgment of conviction."); *Engle v. Isaac*, 456 U.S. 107, 126 (1982) ("[c]*ollateral review* of conviction" referred to as "the Great Writ" of habeas corpus) (emphasis added).

Indeed, since this Court speaks of *state* "collateral review" in the same sense as that term's established *federal* meaning (*see supra*, at 22-24),[16] it is that much

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[16] *See also Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004) ("Beyond that, there exists both *state and federal collateral review*. *See* Mich. Rule Crim. Proc. 6.500 (2004); 28 U.S.C. § 2254.") (emphasis added); *Danforth v. Minnesota*, 552 U.S. 264, 300 (2008) ("[T]he reasons the . . . Court provided for adopting Justice Harlan's view apply to *state as well as federal collateral review.*") (emphasis added); *Withrow v. Williams*, 507 U.S. 680, 686 (1993) (referring to federal habeas corpus review as "collateral review"); *Swain v. Pressley*, 430 U.S. 372, 375, 377-78 (1977) (describing § 2255 as establishing a "procedure for collateral review of federal convictions[,]" and the District of Columbia's § 2255-like provision as "a procedure for *collateral review* of convictions") (emphasis added); *Loper v. Beto*, 405 U.S. 473, 479 n.6 (1972) (referring to § 2254 federal habeas corpus court as conducting "second-level *collateral review* of [state court] judgments of conviction") (emphasis added); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-51 (2006) (referring to "federal habeas corpus cases" as "*collateral review*") (emphasis added); *Saffle v. Parks*, 494 U.S. 484, 487 (1990) (as "Parks petitions the federal courts for a writ of habeas corpus[,] . . . he is before us on *collateral review*") (emphasis added); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 (1986) (§ 2254 action referred to as "federal collateral review," available to state prisoner launching "collateral attack [ ]" upon conviction); *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 508 (1982) ("Petitioner seeks habeas corpus *collateral review* by a federal court of the Pennsylvania decision. Her application was filed under 28 U.S.C. § 2254(a).") (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (Powell, J., concurring in part and concurring in the judgment) ("Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both *state and federal collateral review.*") (emphasis added). *And see* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas

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more evident that Congress had that established federal meaning in mind in enacting § 2244(d)(2) of the AEDPA.[17]

Third, the context in which Congress used the term "collateral review" in two other parts of § 2244, evidences its intent to define the term as a vehicle for challenging a judgment of conviction or sentence. Section 2244(b)(2)(A) provides that a "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court, that was previously unavailable." *Id.* (emphasis added).[18] In a

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Corpus in Capital Cases, Committee Report and Proposal 5 (Aug. 23, 1989) ("The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true *both during state and federal collateral review.*") (emphasis added).

[17] Moreover, the term "collateral review," with its established federal meaning, was used by Congress as early as 1970, in the context of the Attorney General's record-keeping responsibilities, in 18 U.S.C. § 3662. *See* P.L. 91-452-Oct. 15, 1970; 84 Stat. 948-952, Sec. 1001. That Congress used this same term, with its established federal meaning some twenty-six years prior to the enactment of the AEDPA, is further evidence that "collateral review" was used by Congress in § 2244(d)(2) to mean a state court proceeding which seeks to invalidate a judgment of conviction or sentence.

[18] Title 28, Section 2253, of the United States Code, creates a functionally identical requirement for federal prisoners.

similar vein, § 2244(d)(1)(C) provides that one of the dates from which the one-year limitations period begins to run is "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on *collateral review*." *Id.* (emphasis added).[19] These subsections of § 2244, as well as 28 U.S.C. § 2254(e)(2)(A)(i) (providing for an evidentiary hearing in a § 2254 action in the case of a "previously unavailable" "new rule of constitutional law, made retroactive to cases on *collateral review*") (emphasis added),[20] indicate that a state or federal "collateral review" proceeding is one in which those "constitutional law[s] . . . made retroactive . . . by the Supreme Court" *may be* raised. The corollary is that a proceeding that does *not* allow for the channeling of retroactively applied constitutional law claims, is not a "collateral review" proceeding within the meaning of these subsections of § 2244. Since Congressional intent may be ascertained "by looking to [a] tolling provision's statutory neighbors," *Duncan*, 533 U.S. at 187

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[19] Title 28, Section 2253, of the United States Code, contains a similarly worded provision, applicable to federal prisoners.

[20] *See also* 28 U.S.C. § 2254(e)(2)(A)(i) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court, that was previously unavailable[.]") (emphasis added).

(Breyer, J., dissenting), that other subsections of § 2244 conceive "collateral review" to mean a proceeding at which the constitutional validity of a conviction may be challenged, also indicates that Congress similarly conceived of § 2244(d)(2).

Given the above three reasons indicating that the phrase "application for State post-conviction or other collateral review" refers only to state applications that seek to invalidate or attack a final judgment of conviction or sentence, it is unsurprising that this reading of § 2244(d)(2) finds substantial support in decisions of the circuit courts of appeals. *See, e.g.*, *Streu v. Dormire*, 557 F.3d 960, 965 (8th Cir. 2009) (in considering "whether a motion to reopen state post-conviction proceedings in Missouri is an 'application for State post-conviction or other collateral review,'" Court inquires as to whether such motion was 'designed to further the ultimate goal of gaining collateral *relief from the judgment of conviction*.") (emphasis added); *Harrelson v. Swan*, 2010 WL 2340827, at *2 (5th Cir. June 10, 2010) (because "nunc pro tunc proceedings" do not call into question "[t]he *propriety* of the original judgments through judicial reexamination," such proceeding "did not constitute 'other collateral review' of . . . conviction and did not toll the limitations period."); *Godfrey v. Dretke*, 396 F.3d 681, 686 (5th Cir. 2005) ("The important issue is whether Godfrey's October 2001 state habeas applications challenging the expired convictions constitute *attacks* on the 'pertinent judgment or claim.'") (emphasis added); *Sindar v. Turley*,

2009 WL 2734661, at *2 (10th Cir. Aug. 28, 2009) (As "Mr. Sindar's state filings . . . did not *challenge* his conviction or sentence," they did not toll the one-year limitations period) (emphasis added); *Davis v. Barrow*, 540 F.3d 1323, 1324 (11th Cir. 2008) (because "Davis's Georgia state motion to reconsider his sentence . . . did not raise any *legal arguments* or otherwise *attack the legality of his sentence*," "the one-year statute of limitations was not tolled") (emphasis added); *Alexander*, 523 F.3d at 1298 ("motion . . . which raised no challenge of *legal error* whatsoever . . . is not a tolling motion.") (emphasis added); *Banjo v. Ayers*, 2010 WL 2403751, at *3 (9th Cir. June 17, 2010) ("Only the time period during which a round of habeas review is pending tolls the statute of limitation; periods between different rounds of collateral *attack* are not tolled.") (emphasis added); *Hartmann*, 492 F.3d at 483-84 (no § 2244(d)(2) tolling for "a state court proceeding that is not *attacking the lawfulness* of the conviction or sentence.") (emphasis added); *Walkowiak*, 272 F.3d at 239 (because the sentence reduction motion at issue did "not entail a *legal challenge* to the original sentence, we hold that . . . the one-year statute of limitations period of that provision is not tolled[.]") (emphasis added); *contra Kholi*, 582 F.3d at 153-54. *See also* 1 J. Liebman & R. Hertz, *Federal Habeas Practice and Procedure* § 5.2(b) at 265 n.56 (5th ed. 2005) (stating that the circuit courts of appeals have made "clear that tolling is appropriate, without regard to the nature of the claims in the state pleading, as long as the state application *challenged* the 'pertinent judgment.'") (emphasis added).

Finally, that the term State "collateral review," as used in § 2244(d)(2), denotes, as does federal "collateral review," an attack or challenge to a judgment of conviction or sentence, is supported by the most evident reason Congress chose to employ the expansive phrase "State post-conviction or other collateral review" in the first place: to comprehend the variously denominated collateral review vehicles employed by the fifty states, vehicles which conventionally provide for collateral *challenge* to a final judgment of conviction. This Court stated in *Duncan v. Walker*, 533 U.S. 167, 177 (2001):

> Congress also may have employed the construction "post-conviction or other collateral" in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction. In some jurisdictions, the term "post-conviction" may denote a particular procedure for review of a conviction that is distinct from other forms of what conventionally is considered to be post-conviction review. For example, Florida employs a procedure that is officially entitled a "Motion to Vacate, Set Aside, or Correct Sentence." Fla. Rule Crim. Proc. 3.850 (2001). The Florida courts have commonly referred to a Rule 3.850 motion as a "motion for post-conviction relief" and have distinguished this procedure from other vehicles for collateral review of a criminal conviction, such as a state petition for habeas corpus. See, *e.g.*, *Bryant v. State*, 780 So.2d 978, 979

(Fla.App.2001) ("[A] petition for habeas corpus cannot be used to circumvent the two-year period for filing motions for post-conviction relief"); *Finley v. State*, 394 So.2d 215, 216 (Fla.App.1981) ("[T]he remedy of habeas corpus is not available as a substitute for post-conviction relief under Rule 3.850"). Congress may have refrained from exclusive reliance on the term "post-conviction" so as to leave no doubt that the tolling provision applies to all types of state collateral review available after a conviction and not just to those denominated "post-conviction" in the parlance of a particular jurisdiction.

Congress, then, by employing, after the more limited term "post-conviction . . . review," the broad term "collateral review," obviated the need to catalog the numerous and varied state court vehicles for effectuating collateral relief – vehicles commonly denominated as habeas corpus, post-conviction relief, *coram nobis*, or motion to vacate sentence.[21] *See*

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[21] In Rhode Island, for example, the recognized statutory vehicle for collaterally attacking a judgment of conviction is the "Post Conviction Remedy," R.I.G.A. § 10-9.1-1, et seq. There are, however, other vehicles that may be used to collaterally challenge a Rhode Island prisoner's conviction or incarceration. *See* R.I.G.L. § 10-9-1, *et seq.* ("Habeas Corpus"). *See also Estate of Sherman v. Almeida*, 610 A.2d 104, 106-07 (R.I. 1992) (discussing the availability of the writ of error *coram nobis*).

And while Rhode Island's "Post Conviction Remedy" tracks the Uniform Post-Conviction Procedure Act (*see generally* L. Yackle, *Postconviction Remedies*, § 1:12, at 51-54) many states use altogether different collateral vehicles to channel challenges to a judgment of conviction or sentence. *See, id.*, at § 1:16, pp.

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L. Yackle, *Postconviction Remedies*, § 1:1, p. 4 (2009) (hereinafter "Yackle") (Congress used "State post-conviction or other collateral review" to "conventionally refer to habeas corpus, *coram nobis* and similar writs or judicial orders that courts issue after a conviction is final, overturning the conviction by reason of some *error of law*.") (emphasis added) (*citing Walker v. Artuz*, 208 F.3d 357, 360 (2d Cir. 2000), *rev'd on other grounds*, 533 U.S. 167 (2001)). The single feature that each of the state court collateral remedies have in common, is their utility as a vehicle for petitioning to *invalidate* an already final judgment of conviction or sentence.[zz] The most discernable reason, then, why Congress used the expansive phrase "State post-conviction or other collateral review"

79-85 (setting out detailed and comprehensive state by state breakdown of the various collateral review vehicles employed by the states); 7 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 28.11(b), p. 303 (3d ed. 2007) (hereinafter "LaFave") ("Although all but a few states have adopted expanded collateral remedies, those remedies vary substantially in structure and scope."). It thus makes perfect sense that Congress, recognizing the wide variance in collateral review vehicles made available by the states, would be careful to allow for the diversity inherent in our federal system.

[zz] *See, e.g.*, 7 LaFave, § 28.11(b), at 306 ("the Uniform Post-Conviction Act . . . approved by the Commissioners on Uniform State Laws", 11A U.L.A. 274 (1997 Supp.), "provides for a collateral *attack* to be filed in the court of conviction.") (emphasis added); L. Yackle, *Postconviction Remedies*, § 2:3, at 94 ("The nature of the federal writ of habeas corpus is substantially the same as that of the state writ[.]"), *id.* at §§ 1:9, 1:12, at pp. 37-41, 51-54 (discussing the "*coram nobis*" and motion to vacate vehicles employed in the various states).

further confirms that Congress understood a "collateral review" application to mean a state court vehicle used to attack or challenge a final judgment of conviction or sentence.[21]

In sum, the plain language of § 2244(d)(2) establishes that "post-conviction . . . review" is *one* species *of* "collateral review." Although the plain language of § 2244(d)(2) does not define the term "collateral review," it is apparent from the manner in which that term has been used by this Court in its decisions referencing state "collateral review," from the established meaning that the term federal "collateral review" has, and from the way Congress used the term in other subsections of § 2244, that Congress understood and intended the term "collateral review" to mean a proceeding in which a state prisoner seeks to upset an otherwise final judgment of conviction or sentence. This interpretation finds support in a number of decisions of the United States Courts of Appeals, and is consistent with the most likely reason Congress employed the expansive phrase "State post-conviction or other collateral review," in the first place.

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[21] Although *Duncan* did propose an alternative reason why Congress may have employed the broad "State post-conviction or other collateral review" phraseology – in recognition of the fact that 28 U.S.C. § 2254 "federal habeas corpus review may [also] be available to *challenge the legality* of a state court order of civil commitment or a state court order of civil contempt," *Duncan*, 533 U.S. at 176 (emphasis added) – even this alternative Congressional rationale supports a reading of "collateral review" to comprehend only *legal* challenges.

II. Interpreting The Phrase "Application For State Post-Conviction Or Other Collateral Review" In 28 U.S.C. § 2244(d)(2) To Refer Only To State Applications That Seek To Collaterally Invalidate Or "Attack" An Otherwise Final Judgment Of Conviction Or Sentence, Advances The Interests That The AEDPA Is Designed To Promote.

A major purpose for the enactment of the AEDPA was to "reduce delays in the execution of state and federal criminal sentences," *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), and, to that end, the one-year limitations period of § 2244(d)(1) was pressed into service. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 179 (2001) ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. . . . This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.").[24] The one-year limitations period

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[24] Prior to the enactment of the AEDPA, this Court had recognized and remarked upon the negative consequences that federal habeas corpus had imposed upon the finality of state court judgments of conviction. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 127-28 (1982) (stating that it "must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution."); *McCleskey v. Zant*, 499

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necessarily acts as a *limitation* on the opportunities a state prisoner might have to fully exhaust his or her state court remedies before pursuing a federal habeas corpus action.[25] Undoubtedly appreciating, however,

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U.S. 467, 491 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *Mackey v. United States*, 401 U.S. 667, 690 (1971) (all parties have an interest in "insuring that there will at some point be the certainty that comes with an end to litigation") (Harlan, J., concurring in the judgment); *Lonchar v. Thomas*, 517 U.S. 314, 333 (1996) (in "Appendix to Opinion of the Court," statement that "[i]n the last 10 years, bills proposing a statute of limitations for federal habeas corpus petitions have been introduced every year in Congress, more than 80 bills in all," followed by an exhaustive listing of such bills).

These concerns for the finality of state court criminal judgments were at the forefront of what ultimately prompted Congress in 1996 to reform the habeas corpus laws. According to the House Conference Report on AEDPA: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." House Conf. Rep. No. 104-518, at 111 (April 15, 1996), *reprinted in* 1996 U.S.C.C.A.N. 944. *See also* Committee Report for the House version, H.R. 729, Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995) (stating that "the bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings," and that "[t]his reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.").

[25] Prior to the enactment of the AEDPA's one-year limitations period, state prisoners could spend *as much time as they wished* pursuing state post-conviction remedies; with, perhaps, an exception for cases in which a state prisoner's prejudicial delay hampered a state's ability to defend a § 2254 action, *see* former

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the interests served by the established doctrine of requiring state prisoners to exhaust state court remedies prior to filing a § 2254 petition,[26] the statute of limitations enacted by Congress allows for exhaustion of state remedies in two ways. First, by commencing the limitations period, *at the earliest*, after the direct appellate review process has concluded (*see* § 2244(d)(1)(A)); and second, by enacting a tolling

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Habeas Rule 9(a), a state prisoner could move on, from state court, to prosecute a § 2254 action in federal court, whenever he or she decided to. Thus, the AEDPA's aim to reduce delay in the finality of state court judgments comes, to a considerable extent, at the expense of a state prisoner's opportunity for state court litigation. *See* M. Tushnet & L. Yackle, *Symbolic Statutes and Real Laws*, 47 Duke L.J. 1, 29 (1997) ("The filing deadline encourages prisoners to file early, while the exhaustion doctrine demands that they postpone federal habeas petitions until state court opportunities for litigation have been tried. That obvious *conflict of purpose* is exacerbated in cases in which prisoners have multiple claims, the state remedies for which are exhausted at different times.") (emphasis added) (footnote omitted).

[26] The doctrine requiring exhaustion of state remedies, codified in § 2254(b), is designed to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). The doctrine advances the interests of comity, recognizing that state judiciaries are equally bound to uphold the federal constitution. *See, e.g., Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Ex Parte Royall*, 117 U.S. 241, 251 (1886). As well, the exhaustion doctrine "increases . . . state courts['] . . . familiar[ity] with and hospital[ity] toward federal constitutional issues," and helps ensure that when federal claims *do* arrive in federal court, such claims are accompanied by a complete factual record which may be afforded a presumption of correctness. *Rose v. Lundy*, 455 U.S. at 519.

provision for "properly filed application[s] for State post-conviction or other collateral review" (§ 2244(d)(2)).

By providing this latter exception to the AEDPA's one-year limitations period, then, Congress quite plainly intended to maintain some opportunity for a state prisoner to collaterally challenge in state court his or her judgment of conviction or sentence, without fear that he or she would be time-barred when later filing a federal habeas corpus petition.[27] *See Duncan*,

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[27] Of course, the exhaustion of state remedies doctrine may be taken too far. There does not appear to be, for example, any basis to the *Kholi* panel's view that it would be an "unseemly prospect" for a federal court to take-up a state prisoner's § 2254 habeas corpus application, while that prisoner was litigating in state court an unrelated state law claim. *Kholi*, 582 F.3d at 155. Provided a federal habeas corpus applicant is not seeking to litigate a purely state-law claim in a federal habeas corpus action (which state-law claim, in any event, is obviously not cognizable in the federal forum (*see, e.g., Rose v. Hodges*, 423 U.S. 19, 21 (1975)), there is simply no independent prohibition on "parallel proceedings" (*Kholi*, 582 F.3d at 155) in state and federal court. *See, e.g., Turnage v. Fabian*, 606 F.3d 933, 942 (8th Cir. 2010) (collecting decisions from the federal courts of appeals holding that "parallel state court proceedings do[ ] not necessarily prevent federal courts from adjudicating § 2254 petitions containing fully exhausted federal claims."); *Pringle v. Court of Common Pleas*, 744 F.2d 297, 299-300 (3rd Cir. 1984) ("Since Pringle's petition presents only her federal claims which have been exhausted in the state courts, she has complied with the requirements for federal-court review. Her challenge of the sentence to the [Pennsylvania] superior court is an independent state claim based on alleged defect in a state court sentencing procedure. This state claim is wholly distinct from Pringle's challenge to the validity of her conviction and has never been raised in the *habeas corpus* petition.").

533 U.S. at 178-79 ("The exhaustion requirement . . . ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower courts may entertain a collateral attack upon that judgment.")

Interpreting the phrase "State post-conviction or other collateral review" to refer only to those applications that seek to invalidate judgments of conviction or sentence, strikes the appropriate balance Congress sought to achieve between finality and exhaustion. *See Duncan*, 533 U.S. at 178 (recognizing that courts should seek a construction of § 2244(d)(2) that "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments."). Such an interpretation abides Congressional policy to "reduce delays in the execution of state and federal criminal sentences," *Woodford v. Garceau*, 538 U.S. at 206, while at the same time respects the interests served by adjudicating in state court any claims that may invalidate a federal habeas petitioner's judgment of conviction or sentence.

Because a discretionary sentence-reduction application by its very nature does not seek the invalidation of a judgment of conviction or sentence,[28] there is

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[28] The Rule 35 "Motion to Reduce Sentence" filed by Mr. Kholi in this case, for example, in no way "challenge[d] the *legality* of the sentence." *Kholi*, 582 F.3d at 152 (emphasis in original). Indeed, such sentence-reduction motion under Rhode Island state law, which merely seeks (and only "during a limited period after sentencing") "leniency" from the sentencing judge

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obviously *no* federal habeas corpus purpose to be served by tolling for the time during which a discretionary sentence reduction application is litigated in state court. Compromising the AEDPA's concern for the finality of state court judgments without advancing principles of exhaustion, evidently fails to appropriately balance the competing interests of finality and exhaustion. Consequently, affording no tolling to a plea for sentence leniency, does no disservice to the exhaustion doctrine, while affirmatively promoting Congress' interest in the finality of state court judgments. As the *Hartmann* court explained:

> Congress, in enacting AEDPA, intended to further principles of comity, finality, and federalism, which are promoted in large part through the requirement, set forth in 28 U.S.C. § 2254(b), that state remedies be exhausted before seeking federal review. *Duncan v. Walker,* 533 U.S. 167, (2001); *Williams v. Taylor,* 529 U.S. 420, 436 (2000). As such, the Supreme Court repeatedly has explained that courts are to evaluate the tolling rules of 28 U.S.C. § 2244(d) together with the exhaustion requirement. Specifically, we are instructed to seek a construction of § 2244(d)(2) which "promotes the exhaustion of state

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(Reporter's Notes to Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure), actually *concedes* the lawfulness of the sentence. *See, e.g., State v. Byrnes*, 456 A.2d 742, 744 (R.I. 1983) (Rule 35's sentence reduction provision "authorizes a court to reduce a *lawful* sentence") (emphasis added).

remedies while respecting the interest in the finality of state court judgments." *Duncan*, 533 U.S. at 178. The exhaustion requirement, in turn, "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. Obviously, when a prisoner in state custody opts to file a motion for discretionary leniency, the state is not being asked to correct errors of legal moment. Whatever interest the state has in deciding the motion, its interest is not one in correcting errors before the federal courts assume jurisdiction.

This understanding is confirmed by the Supreme Court's recent pronouncement that "AEDPA's exhaustion provision and tolling provision work together." *Lawrence v. Florida*, 549 U.S. 327 (2007). Where the goals of exhaustion end, the need for tolling recedes. Moreover, were we to hold that the optional Delaware Rule 35(b) motion has the effect of tolling the limitations period of § 2244(d)(1), we might create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic. *Cf. id.* at 1085. Finally, even though AEDPA's tolling provisions may embrace goals other than exhaustion, such as comity and the desire to avoid simultaneous

> litigation, tolling for a leniency petition does not advance those goals.

Hartmann, 492 F.3d at 483-84 (parallel citations omitted).[29]

Interpreting the phrase "State post-conviction or other collateral review," then, to refer only to those applications that seek to invalidate judgments of conviction or sentence, strikes the appropriate balance that Congress sought to achieve between the finality of state court judgments, and the exhaustion of state court remedies.

III. The First Circuit Erred In Holding That A Motion To Reduce Sentence Constituting A Plea For Leniency Was An "Application For State Post-Conviction Or Other Collateral Review," Under 28 U.S.C. § 2244(d)(2).

As the *Kholi* panel recognized, Mr. Kholi's "Rule 35(a) motion [w]as a plea for leniency, simpliciter" which in no way "challenge[d] the *legality* of the sentence." *Kholi v. Wall*, 582 F.3d 147, 152, 153 (1st Cir. 2009) (emphasis in original). Consequently, for the reasons advanced in Parts I-II of the Argument, Mr. Kholi's sentence reduction motion was not an "application for State post-conviction or other collateral

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[29] *See also Alexander*, 523 F.3d at 1291 (because sentence reduction motion filed by Florida inmate did "not advance AEDPA's interests in allowing state courts a full opportunity to consider federal-law challenges or in the finality of state court judgments," such motion could not be a § 2244(d)(2) tolling vehicle).

review," 28 U.S.C. § 2244(d)(2). The Court of Appeals for the First Circuit, in holding otherwise, was in error.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the United States Court of Appeals for the First Circuit, which reversed the United States District Court for the District of Rhode Island's judgment dismissing Mr. Kholi's federal habeas corpus petition as time barred.

Respectfully submitted,

PATRICK C. LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L. WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R. BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag.ri.gov

Attorneys for Petitioner
A.T. Wall

RESPONDENT'S BRIEF

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In The

Supreme Court of the United States

ASHBEL T. WALL, II, DIRECTOR,
RHODE ISLAND DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT KHALIL KHOLI

JUDITH H. MIZNER
Counsel of Record
FEDERAL DEFENDER OFFICE
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061
Judith_Mizner@fd.org

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a state provides a method for the discretionary, equitable modification of a criminal judgment and sentence, does that remedy constitute "post conviction or other collateral review" within the meaning of 28 U.S.C. §2244(d)(2) such that it tolls the limitation period for the filing of a federal petition for a writ of habeas corpus?

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STATE RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed, or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari.

STATEMENT OF THE CASE

Khalil Kholi followed the procedures set out by the State of Rhode Island for directly appealing his December 1993 conviction and seeking state post-conviction review of his conviction and sentence. He first appealed the state Superior Court judgment to the state Supreme Court. That court affirmed the judgment on February 29, 1996; Mr. Kholi did not seek certiorari review in this Court. *Kholi v. Wall*, 582 F.3d 147, 149 (1st Cir. 2009). His direct appeal then

final, Mr. Kholi sought review of his sentence pursuant to Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure, timely filing a motion for a reduction in sentence on May 16, 1996. The trial court denied that motion on August 27, 1996; Mr. Kholi's appeal of that denial was affirmed by the Rhode Island Supreme Court on January 16, 1998. *Id.* at 149-150. While that appeal was pending, Mr. Kholi filed, on May 23, 1997, an application for post-conviction relief pursuant to R.I. Gen. Laws §10-9.1-1 *et seq.*, alleging, *inter alia*, ineffective assistance of counsel. 582 F.3d at 150. That application was denied on April 23, 2003 and the Rhode Island Supreme Court affirmed the denial on December 14, 2006. *Id.*

Having exhausted the available state court avenues for relief from his conviction and sentence, Mr. Kholi filed a *pro se* habeas corpus petition in the federal district court on September 5, 2007, approximately nine months after his state efforts were concluded. 582 F.3d at 150. The district court dismissed his petition as untimely. *Id.* The court determined that Mr. Kholi's conviction had become final on June 12, 1996. *Id.* It concluded that the post-conviction relief application filed on May 23, 1997 and finally decided on December 14, 2006 tolled the one-year limitation period under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) as an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. §2244(d)(2). *Id.* However, it also concluded that the motion filed pursuant to

Rule 35, which in this case sought discretionary sentencing leniency, did not. *Id.* Having determined that the Rule 35 motion did not toll the limitation period, the court calculated that the one-year period for filing had expired on January 4, 2007.[1] A listing of the state court proceedings discussed above is set out in table form at Appendix 1a.

The United States Court of Appeals for the First Circuit reversed the district court, holding that the Rule 35 motion was an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" within the meaning of 28 U.S.C. §2244(d)(2), which tolled the period for filing for federal habeas corpus relief. The petition was, therefore, timely filed. *Id.* at 153, 156.

The First Circuit began its analysis with the text of 28 U.S.C. §2244(d)(2): "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." The court concluded that the text's "plain meaning strongly favors [Mr. Kholi's] position." 582

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[1] The district court accepted the state's assertion that Mr. Kholi's conviction had become final on June 12, 1996. Pet. App. 25. In fact, his conviction became final on May 29, 1996, when his time for filing a petition for a writ of certiorari in this Court expired. Using the district court's analysis, the year would have expired on December 20, 2006. This discrepancy makes no difference to the issue in this case.

F.3d at 152. Mr. Kholi's sentence was the "pertinent judgment," the court found, citing to *Howard v. Ulibarri*, 457 F.3d 1146, 1148 (10th Cir. 2006) (motion for modification of sentence given tolling effect under §2244(d)(2)), and "[t]he Rule 35(a) motion is obviously a motion that seeks state post-conviction review of that sentence." 582 F.3d at 152. The court rejected the contention that tolling applies only to motions challenging the legal basis for the judgment. "[W]e deem it significant that, in drafting section 2244(d)(2), Congress employed the expansive term 'review' instead of a more confining term (such as 'challenge')." *Id.* at 153.

The First Circuit considered and rejected contrary reasoning used in *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001), in which the Fourth Circuit decided that a motion under a West Virginia rule analogous to Rhode Island Rule 35 was not "collateral" for purposes of §2244(d)(2) – and therefore did not toll the limitation period – because it was filed in the original criminal case and did not challenge the validity of the conviction or sentence. *See Kholi*, 582 F.3d at 153-154. The First Circuit viewed the Fourth Circuit's approach as reading the word "or" out of the statute, and noted that other state motions filed in the original case and heard by the trial judge (such as the application for post-conviction relief filed under R.I. Gen. Laws §10-9.1-1 in this case) had been deemed appropriate tolling mechanisms. *Id.*[2] It also

[2] Rhode Island's assertion that the First Circuit read §2244(d)(2) as permitting tolling for "even *non*-collateral state

(Continued on following page)

noted that a motion for sentencing leniency would be "collateral" within the general meaning of the term; the motion "initiated proceedings that were supplementary to the underlying criminal case (the judgment in which became final independent of the Rule 35(a) motion)." 582 F.3d at 154 n.6.

The First Circuit was similarly "unconvinced" by the reasoning of the Third and Eleventh Circuits in *Hartmann v. Carroll*, 492 F.3d 478 (3d Cir. 2007), and *Alexander v. Secretary, Dep't of Corrections*, 523 F.3d 1291 (11th Cir. 2008), which, in deciding that state motions for sentencing leniency did not toll the limitations period, focused on the fact that such motions did not implicate the AEDPA's exhaustion of state remedies requirement. *Hartmann*, 492 F.3d at 483-484; *Alexander*, 523 F.3d at 1297. As the First Circuit recognized, the AEDPA also embodied principles of comity and federalism that supported tolling. *Kholi*, 582 F.3d at 154-155.

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court post-conviction applications," Pet'r Br. 13, ignores the context of the statement. The court was addressing the definition of "collateral" as used in *Walkowiak*, that is, as a motion not filed in the original criminal proceeding. *Kholi*, 582 F.3d at 153. The court also noted that the term "collateral" has a broader scope than that used in *Walkowiak* and that the Rule 35 motion "would likely qualify" as collateral under that broader definition. *Id.* at 154 n.6.

SUMMARY OF ARGUMENT

In 28 U.S.C. §2244(d)(1), Congress provided a one-year limitation period for the filing of an application for federal habeas corpus relief, triggered by one of four enumerated events. Congress also provided for the tolling of that one-year clock during the pendency of "a properly filed State application for post-conviction or other collateral review with respect to the pertinent judgment or claim." 28 U.S.C. §2244(d)(2). The legislature did not define the terms used in that provision.

Rhode Island, like many other states, provides persons convicted of crimes the opportunity to pursue a variety of post-conviction remedies, including both legal challenges and discretionary, equitable sentencing relief. The federal district court dismissed Khalil Kholi's petition for federal habeas corpus relief as untimely, adopting the magistrate judge's report and recommendation that a motion for reduction of sentence under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure did not trigger tolling under §2244(d)(2) because tolling required a motion based on a legal challenge. Pet. App. 29-30.

In reversing the district court and holding that the Rhode Island Rule 35 motion *did* trigger tolling under §2244(d)(2), the United States Court of Appeals for the First Circuit correctly interpreted the undefined phrase "post-conviction or other collateral review" in the AEDPA's tolling provision. The Rule 35 motion clearly sought post-conviction review; it was

filed after Mr. Kholi's conviction was affirmed on direct appeal to the Rhode Island Supreme Court. *Kholi*, 582 F.3d at 152.

Through the use of the word "other," Congress included post-conviction review as a form of collateral review within the scope of the tolling provision. Collateral review has long meant review distinct and apart from direct appellate review. The use of the expansive word "review" similarly underscores the inclusive and comprehensive nature of the tolling provision. As a "looking over or examination" or "consideration, inspection, or reexamination," *see Webster's Third New International Dictionary* 1944 (2002); *Black's Law Dictionary* 1434 (9th ed. 2009), review is not limited to a legal challenge but includes a motion seeking discretionary, equitable relief. Thus, examining the text of the statute and the common usage and ordinary understanding of its words, and giving meaning and effect to all of its terms, it is clear that the tolling provision encompasses the motion at issue here – a motion seeking a discretionary reduction of sentence.

In sharp contrast, Rhode Island's efforts to limit collateral review to legal challenges is not supported by the statutory text and rests on flawed logic. Rhode Island also ignores the context of the Court's references to legal challenges and collateral review in the habeas cases upon which it relies. While those cases support the proposition that state court proceedings seeking legal redress are within the scope of

collateral review, they do not address the question presented here: whether state court proceedings seeking discretionary, equitable relief also are within the scope of "collateral review" for purposes of the AEDPA's tolling provision.

The First Circuit's construction is consistent not only with the statute's plain language, but also with the principles of federalism and comity reflected in the AEDPA. A state is entitled to determine the opportunities for relief from criminal judgment, including sentence, that it will make available to its prisoners. Congress recognized that states provide a variety of forms of post-conviction relief. It affirmed the respect for state processes at the heart of federalism and comity by linking the statute's tolling mechanism to *state* applications for review. Respect for a state's determination that its prisoners should have access to a variety of avenues of post-conviction or other collateral review means, in the habeas context, that comity is not limited to the requirement of exhaustion of state remedies, and it supports the inclusion of post-conviction discretionary sentencing review as a tolling mechanism. This inclusion is also consistent with interests of finality, which the Court has recognized is a state interest rather than a federal interest. If the state provides a particular form of post-conviction review, it does not view use of that form as contrary to its interest in finality.

Policy considerations, in addition to federalism and comity, further support the First Circuit's conclusion that a motion for reduction of sentence seeking

discretionary relief is a tolling mechanism. A prisoner who obtains relief in the state court may be less likely to pursue federal habeas review, thereby conserving federal judicial resources. Limiting tolling to applications presenting only legal challenges would undermine the predictability and certainty that Congress sought to provide in drawing lines for the initiation of federal habeas proceedings. Many states provide for both legal and equitable sentencing relief in the same provision. If tolling is to turn on the nature of the relief sought, federal courts will have to examine the language of each motion, perhaps with reference to state rules concerning the construction of *pro se* pleadings, and will have to make judgments about whether the language of each application sought legal, equitable, or mixed relief, imposing an additional and unnecessary burden on the federal system.

The First Circuit's decision is supported by the statutory text, the plain meaning and common usage of the statutory words, and is consistent with the policies underlying the AEDPA. Its judgment should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF 28 U.S.C. §2244(d)(2) SUPPORTS THE CONCLUSION THAT A MOTION PURSUANT TO A STATE PROVISION AUTHORIZING DISCRETIONARY, EQUITABLE SENTENCING RELIEF FOLLOWING FINAL JUDGMENT IS AN "APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW."

An application for federal habeas corpus relief "by a person in custody pursuant to a judgment of the State court" must be filed within the one-year limitations period set by Congress in 28 U.S.C. §2244(d)(1). The one-year clock, once started by the occurrence of one of four enumerated events, pauses when the statutory tolling condition found in §2244(d)(2) is met. That provision states: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim[3] is pending shall not be counted

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[3] Rhode Island has not questioned whether Mr. Kholi's motion concerned "the pertinent judgment or claim." Nor could it. The sentence is part of the final judgment in a criminal case. *See Bradley v. United States*, 410 U.S. 605, 609 (1973). The Rule 35 motion here sought a change in the sentence imposed as part of the judgment. Whether or not it claims illegality in the original imposition of sentence, the motion challenges the merits of the sentence and is, therefore, related to "the pertinent judgment."

toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2).

Congress did not define the phrase "application for State post-conviction or other collateral review" as it is used in §2244(d)(2). This Court must therefore determine whether a state post-conviction motion under a state rule that provides for both discretionary reduction of sentence and correction of an illegal sentence fits within the plain meaning of the statutory language. Here, as in other cases interpreting the terms left undefined in the AEDPA's statute of limitation provision, the Court must begin with the words of the statute and look to their common usage and understanding. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001) (interpreting "State post-conviction or other collateral review"); *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000) (interpreting "properly filed"); *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (same); *see also Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009) (interpreting "final" in 28 U.S.C. §2244(d)(1)(A)). Application of these basic tenets of statutory construction demonstrates that a motion for a discretionary post-conviction sentence reduction, such as the Rule 35 motion in this case, is an "application for State post-conviction or other collateral review."

A. Post-Conviction or Other Collateral Review Is Review Following Direct Review.

In *Duncan v. Walker*, the Court construed the term "State post-conviction or other collateral review"

in 28 U.S.C. §2244(d)(2) as limiting tolling mechanisms to *state* court review. 533 U.S. at 172-175. It also recognized that, by using this language, Congress intended to encompass the variety of available state collateral review processes as tolling mechanisms, and to refer to a class of processes rather than to any particular vehicle. *Id.* at 176-177. The Court observed that "Congress also may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction." *Id.* at 177. Had Congress wished to further restrict the type of state applications that tolls the AEDPA's limitation period, it could have defined a narrower class. Rhode Island now asks this Court to limit what Congress did not.

The statutory text does not support the limitation Rhode Island seeks. If one applies the basic principles of statutory construction by beginning with the plain language of the statute and giving effect, if possible, to all terms of the statute, *see, e.g.*, *Duncan*, 533 U.S. at 172, 174, it becomes clear that the limitation period of 28 U.S.C. §2244(d)(1) is tolled by a motion seeking discretionary, equitable collateral relief, such as the Rule 35 motion Mr. Kholi filed. If meaning and effect is given to each word of the phrase "post-conviction or other collateral review," *see, e.g.*, *Duncan*, 533 U.S. at 174-175 (and cases cited therein), "post-conviction" must be construed as a type of collateral review.

To begin, the word "other" generally signifies that its antecedent is part of the subsequent group. By way of illustration, when an advertisement for a drug advises "speak to your doctor if you develop X, Y, Z or other symptoms," the listener understands X, Y, and Z to be symptoms. The humor in the title of Gerald Durell's book "My Family and Other Animals"[4] comes from the inclusion of his family in the animal group. Post-conviction review, by the plain words of the statute, must be a form of collateral review.

Rhode Island agrees with the general proposition that post-conviction review is a type of collateral review, Pet'r Br. 18-19, but nonetheless seeks to define "collateral" to limit the scope of post-conviction review rather than to encompass the array of state remedies such review includes. Instead of accepting the natural reading of the statute that all post-conviction review with respect to the judgment at issue falls within the scope of "collateral review," Rhode Island seeks to narrow "collateral review" to include only those applications that challenge or attack the *legality* of a final judgment of conviction or sentence,[5] and thereby to exclude from collateral

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[4] Gerald Durrell, *My Family and Other Animals* (Rupert Hart-Davis Ltd. 1956).

[5] However, Rhode Island has also summarized its interpretation of the term "collateral review" as "a proceeding at which a state prisoner seeks to upset an otherwise final judgment of conviction or sentence." Pet'r Br. 20. A motion for reduction of sentence certainly falls within this interpretation; Mr. Kholi sought to upset his otherwise final sentence by seeking equitable relief.

review an application for post-conviction review of a sentence seeking discretionary, equitable relief. Pet'r Br. 20-35.

This narrowing fails to respect both the plain language of the statute and the commonly understood meaning of the relevant terms. For purposes of determining whether an application for state relief serves to toll the AEDPA's time limitation, the plain language of the statutory text and common understanding require construing the phrase "post-conviction or other collateral review" to include a class of review seeking sentencing relief following final judgment, without regard to whether the relief from judgment sought is legal or equitable. Rhode Island's attempt to exclude equitable post-conviction review from the statutory array of state tolling mechanisms and to limit the scope of "post-conviction or other collateral review" to the state equivalent of federal habeas corpus review is contrary to Congress's choice of the broad terms "post-conviction" and "collateral."

Rhode Island's argument also lacks both logical and textual support. As to logic, Rhode Island in essence argues that habeas review is collateral review; habeas review requires a legal challenge; therefore collateral review requires a legal challenge. This argument is fallacious, equivalent in form to the following: a bachelor is a man; a bachelor is an unmarried person; therefore a man is an unmarried person. While habeas corpus review is unquestionably collateral review and requires a legal challenge, not all collateral review is habeas review. "Other

collateral review" may, or may not, include a legal challenge.

The state's reasoning is also inconsistent with the ordinary meaning of "collateral" and the Court's long-time use of that term. In common usage, "collateral" means "not direct." The Oxford English Dictionary Online defines "collateral" as "[a]ccompanying, attendant, concomitant" and "[l]ying aside from the main subject, line of action, issue, purpose, etc.; side-; subordinate, indirect." *Oxford English Dictionary Online* (2d ed. 1989), *available at* http://www.oed.com. Merriam-Webster's defines "collateral" as "accompanying as secondary or subordinate," and "indirect." *Merriam-Webster's Dictionary* 243 (11th ed. 2003). Black's Law Dictionary defines "collateral" as "[s]upplementary; accompanying but secondary and subordinate to" and defines a "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal; . . . ." *Black's Law Dictionary* 297-298 (9th ed. 2009).

Consistent with these dictionary definitions, the Court has described "collateral" as "not direct" in a variety of contexts. In reviewing an action of ejectment upon a writ of error, for example, the Court stated:

> The counsel for the defendant in error have, in the argument, considered these proceedings open to the same examination and objections, as they would be in an appellate court, on a direct proceeding to bring them under review. This, however is not the light

> in which we view the questions now before us. These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal.

Thompson v. Tolmie, 27 U.S. 157, 163 (1829).

In *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), a state negligence action brought after a libel in admiralty concerning the res judicata effect of the libel and the availability of the same grounds for recovery, the Court observed that "[a] judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not bringing another action upon the same cause." 274 U.S. at 325 (collecting cases); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (quoting *Baltimore S.S. Co.* in price-fixing cases).

Discussing the applicability of a statute concerning attorney's fees in a school desegregation case, the Court stated that it had "recognized a distinction between the application of a change in the law that takes place while a case is on direct review on the one hand, and its effect on a final judgment under collateral attack on the other hand." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 710-711 (1974) (footnotes and citation omitted). Similarly, both *Panama Mail S.S. Co. v. Vargas*, 231 U.S. 670, 671 (1930), and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940), distinguished between review in direct and collateral attacks in,

respectively, a suit in admiralty and an action to recover on bonds.

These cases make clear that "collateral review" of a judgment is review other than review of a judgment in the direct appeal process. This distinction has been used in the habeas corpus context both before and after the AEDPA's enactment in 1996. *See, e.g., Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-351 (2006) (stating general rule that "a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review"); *Trevino v. Texas*, 503 U.S. 562, 568 (1992) (contrasting availability of relief in "cases pending on direct review or not yet final when [a case] was decided" and in "cases on collateral review"); *Shea v. Louisiana*, 470 U.S. 51, 59-60 (1985) (in distinguishing between collateral and direct review, stating "[t]he one litigant has already taken his case through the primary system. The other has not."); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (describing North Carolina rule as requiring defendant "initially to raise a legal issue on appeal rather than on post-conviction review"); *United States v. Frady*, 456 U.S. 152, 166 (1982) (distinguishing post-conviction relief from direct appeal). Review apart from direct appeal plainly encompasses post-conviction review following a final judgment. Therefore, whether as a matter of plain meaning or the Court's usage, "post-conviction or other collateral review" includes review under-taken after a judgment has become final.

Construing the term "collateral review" in 28 U.S.C. §2244(d)(2) as concerned with the timing of an

application rather than simply the nature of the review sought (legal or equitable) is further supported by *Teague v. Lane*, 489 U.S. 288 (1989), in which the Court described a collateral remedy as one "'providing an avenue for upsetting judgments that have become otherwise final.'" 489 U.S. at 306 (quoting *MacKay v. United States*, 401 U.S. 667, 682-683 (1971)). An application filed after a direct appeal has become final is an action seeking collateral review. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (discussing distinction between direct and collateral review and defining direct review involving a federal question as coming to an end after certiorari); *Frady*, 456 U.S. at 164-165 (in discussion of standard of review of claims raised on collateral review, describing collateral review as arising after expiration of time allowed for direct review or affirmance of conviction on appeal). The Court's "unvarying understanding of finality for collateral review purposes" is that a conviction is final "when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527-528 (2003) (collecting cases).

Under this precedent, and contrary to the state's view, Rhode Island Rule 35 plainly affords collateral rather than direct review. A motion under the rule must be filed, *inter alia*, within 120 days after the judgment has become final. It seeks to vacate the judgment and sentence and obtain a new judgment with a lower sentence. It may ask the court to make a

decision on the basis of information not in the record of a direct appeal. *See State v. Furtado*, 774 A.2d 38, 39 (R.I. 2001) (describing survey of sentences compiled by defendant). The judgment remains in effect while the motion is under consideration. Unlike the state provision at issue in the Eleventh Circuit's decision in *Alexander v. Secretary, Dep't of Corrections*, 523 F.3d 1291 (11th Cir. 2008), a Rule 35 motion may be appealed separately from any direct appeal. *See State v. Smith*, 676 A.2d 765, 766 (R.I. 1996) (remanding denial of Rule 35 motion to reduce sentence where sentencing judge "unduly constricted the broad scope of his discretion in ruling on defendant's motion to reduce his sentence"). The Rhode Island Supreme Court has viewed the motion as a process apart from a direct appeal, stating that complaints about sentences are not appropriate for review on direct appeal, but should be undertaken under Rule 35. *State v. Martinez*, 824 A.2d 443, 451 (R.I. 2003); *State v. Sostre*, 736 A.2d 95, 96 (R.I. 1999).[6]

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[6] Review may be collateral even where the application is heard by the judge in the criminal case resulting in the conviction from which relief is sought. An application for relief pursuant to 28 U.S.C. §2255 is deemed to be collateral review, that motion is heard by the original trial judge. *See* 28 U.S.C. §2255(a) (providing that a "prisoner . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence"). A motion for post-conviction relief filed pursuant to R.I. Gen. Laws §10-9.1-1 *et seq.*, conceded by the state and found by the courts below to be a motion tolling the AEDPA's limitations, is heard by the judge who sat in the underlying criminal

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Turning to the last word of the phrase at issue, Webster's defines "review" as "a looking over or examination with a view to amendment or improvement." *Webster's Third New International Dictionary* 1944 (2002). The word "review" is defined by Black's as "[c]onsideration, inspection or reexamination of a subject or thing." *Black's Law Dictionary* 1434 (9th ed. 2009). These definitions in no way suggest a limitation of tolling mechanisms to applications for review raising only legal challenges to a judgment or sentence. As the First Circuit stated after considering these definitions, had Congress intended to limit tolling mechanisms to those raising only legal challenges, it could have done so by selecting a narrower term than "review" to describe the class of applications triggering the tolling of the AEDPA's limitation period. *Kholi*, 582 F.3d at 153. Congress's choice of the word "review" thus further supports the First Circuit's conclusion that Mr. Kholi's motion for reduction of sentence, filed in the state court after affirmance of the judgment by the Rhode Island Supreme Court in order to seek equitable, discretionary relief from that judgment, was an "application for State post-conviction

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case. *See* R.I. Gen. Laws §10-9.1-2; *Kholi*, 582 F.3d at 153-154. Other states similarly provide that post-conviction relief motions are heard by the trial judge. *See* Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook* 6 (2009) (hereafter "Wilkes") (stating that in the District of Columbia and 38 states the application for the principal post-conviction remedy is filed in the "convicting court"). Yet these motions, too, are deemed to toll the AEDPA's limitations.

or other collateral review" tolling the AEDPA's limitation period. Such a motion for equitable, discretionary relief "seeks to upset an otherwise final . . . sentence," Pet'r Br. 20, even if not on legal grounds. Thus, the plain language of 28 U.S.C. §2244(d)(2) supports the First Circuit's conclusion that Rhode Island Rule 35 tolls the AEDPA's limitation period.

B. Construing "Post-Conviction or Other Collateral Review" to Include Discretionary, Equitable Review of a Sentence Following Final Judgment After Direct Appeal Is Consistent With Principles of Federalism and Comity.

The AEDPA reflects Congress's interests in federalism and comity as well as in finality. Federalism and comity afford respect for state processes. Federalism "concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

As the Court explained in *Younger v. Harris*, 401 U.S. 37 (1971), addressing federal court abstention, comity is a doctrine based on federalism:

> [T]he notion of "comity," that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and

> their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism."

Id. at 44; *see also Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2330-2337 (2010) (comity considerations required dismissal of federal suit by taxpayer alleging discriminatory state taxation).

Comity "'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.'" *Rhines v. Weber*, 544 U.S. 269, 274 (2005) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court implemented the comity principle in *Rhines* by holding that where dismissal of a federal petition for a writ of habeas corpus containing both exhausted and unexhausted claims would result in an inability to refile after all claims had been exhausted, a stay of the petition pending exhaustion in state court could be appropriate, notwithstanding finality interests. 544 U.S. at 277-278; *see also Duncan*, 533 U.S. at 181 (noting "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review").

Congress affirmed these principles in tying the tolling mechanism of §2244(d)(2) to state procedures. Its choice of the broad phrase "State post-conviction

or other collateral review" to define the tolling mechanism ensures that the states receive the deference and opportunities our federal system contemplates and that litigants avail themselves of state court remedies before seeking federal collateral review. No federal interest in uniformity supersedes these principles and purposes. As the Court recently stated, a federal desire for uniformity "does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

In the habeas context, principles of comity clearly extend beyond the requirement of exhaustion of state remedies. For example, a federal court generally will not address habeas claims resolved on independent and adequate state grounds, including state procedural grounds. *See, e.g.*, *Dretke v. Haley*, 541 U.S. 386, 392-393 (2004) (citing cases); *Simpson v. Matesanz*, 175 F.3d 200, 205-206 (1st Cir. 1999). Such grounds may include a discretionary state rule. In *Beard v. Kindler*, 130 S. Ct. 612 (2009), this Court held "that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review," noting that "discretionary rules are often desirable." 130 S. Ct. at 618. And in *Danforth*, this Court stated that "considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*." 552 U.S. at 279-280.

Nor are comity concerns limited to an opportunity for a state to address federal constitutional claims, as illustrated by federal appellate decisions holding that state court proceedings need not present a federal claim to toll the AEDPA limitation period.[7] Tolling the limitation period to allow recourse to state remedies not related to federal claims presented in a federal habeas petition is consistent with finality concerns and with the fundamental fairness concern of enabling an individual to avail himself of all state remedies prior to seeking federal relief, if necessary. Indeed, the Court has recognized that the finality of state convictions is a state interest rather than a federal interest. *Danforth*, 552 U.S. at 280; *see also Kindler v. Horn*, 542 F.3d 70, 77-78 (3d Cir.

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[7] *See, e.g., Cowherd v. Million*, 380 F.3d 909, 912-914 (6th Cir. 2004) (en banc) (state post-conviction motion that did not include federal claim tolls limitation period); *Ford v. Moore*, 296 F.3d 1035, 1037-1040 (11th Cir. 2002) (motion challenging state sentence as illegal under state law attacked judgment that was subject of federal habeas petition and tolled limitation period); *Carter v. Litscher*, 275 F.3d 663, 665-666 (7th Cir. 2001) (state collateral proceeding based solely on state law issues tolls limitation period); *see also Bishop v. Dormire*, 526 F.3d 382, 383-384 (8th Cir. 2008) (motion to recall mandate held to be an application for state post-conviction or other collateral relief with respect to pertinent judgment or claim even though motion was not necessary to exhaust any federally cognizable claims and raised an issue not cognizable in federal habeas corpus); *Sweger v. Chesney*, 294 F.3d 506, 514, 519-520 (3d Cir. 2002) (state post-conviction proceeding tolls the AEDPA's limitation period if it challenges same judgment challenged in federal petition, whether or not it contains claims presented in federal petition).

2008) (rejecting Pennsylvania's efforts to "forge a nonexistent link between exhaustion and statutory tolling" and stating that the AEDPA's "text undermines the Commonwealth's attempt to read exhaustion into the statute's tolling requirements"), *rev'd on other grounds*, *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009).

Whether or not a particular state-authorized avenue of relief available after the conclusion of a direct appeal seeks legal or discretionary, equitable relief, by enacting such a provision a state has determined that defendants should have an opportunity, as part of the state criminal justice process, to pursue that review. It is reasonable to conclude that Congress incorporated all forms of state applications for post-conviction or other collateral review as tolling mechanisms in order to respect the state's determination that such remedies should be made available to state prisoners.[8]

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[8] A state-by-state compilation of the multiple forms of "post-conviction or other collateral review" can be found in Wilkes, *supra* n.6. A few examples are set out here.

Rhode Island provides a post-conviction remedy to challenge the validity of a conviction or sentence through an application in the court in which the judgment of conviction was entered. The judgment may be appealed to the Rhode Island Supreme Court. R.I. Gen. Laws §10-9.1-1 *et seq.* Rule 33 of the Rules of Criminal Procedure for the Superior Court of Rhode Island provides for the filing of a motion for new trial based on newly discovered evidence within three years after the entry of judgment by the court. As previously discussed, Rule 35(a) of the Rules of Criminal Procedure for the Superior Court of Rhode Island provides

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for the correction or reduction of sentence. Actions on motions for new trial and for correction or reduction of sentence may be appealed to the Rhode Island Supreme Court.

Rule 37 of the Arkansas Rules of Criminal Procedure provides for post-conviction relief through the filing of a petition in the trial court alleging errors of law or jurisdiction. Time frames for filing run from conviction or resolution of appeal. The judgment may be appealed. Habeas corpus and coram nobis are available in limited circumstances pursuant to Ark. Code Ann. §16-112-101 *et seq.* and common law. Ark. Code Ann. §16-90-111 provides for post-conviction relief in the form of correction or reduction of the sentence (including reduction in the exercise of discretionary leniency) within time frames running from conviction or appeal.

Idaho provides for post-conviction proceedings challenging the lawfulness of the conviction or sentence or claiming the existence of "evidence of material facts, not previously presented and heard" that requires vacating the conviction or sentence "in the interest of justice." Idaho Code §19-4901. The application is filed in the district court in which the conviction took place. Idaho Code §19-4902. A final judgment may be appealed to the Idaho Supreme Court. Idaho Code §19-4909. Rule 35 of the Idaho Rules of Criminal Procedure provides for the correction of an illegal sentence at any time. It provides for the correction of a sentence imposed in an illegal manner and for reduction of a sentence pursuant to a motion filed within 120 days of judgment. An order may be appealed. Coram nobis is available under Rule 60(b) of the Idaho Rules of Civil Procedure. *See Stuart v. State*, 914 P.2d 933 (Idaho 1996).

New Mexico provides for habeas corpus relief pursuant to Rule 5-802 of the New Mexico Rules of Criminal Procedure. Rule 5-801 provides for the correction of an illegal sentence at any time, and a motion to correct a sentence imposed in an illegal manner or to reduce a sentence within, *inter alia*, 90 days of the imposition of sentence or receipt of a mandate after affirmance of a judgment or dismissal of appeal. Coram nobis relief is available under certain circumstances under Rule 60(b) of the New Mexico Rules of Civil Procedure.

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Rhode Island's analysis, however, suggests that Congress did not intend to leave it to the states to determine the scope of relief available to those it criminally charges. That suggestion ignores this Court's precedents in which the Court has looked to state law in construing the AEDPA's undefined terms. In *Artuz*, 531 U.S. at 8-9, and in *Pace*, 544 U.S. at 413-414, the Court construed the term "properly filed" by examining state law and held that an application is properly filed if it meets the criteria set by the state. Similarly, in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), the Court said that a state ruling on timeliness "would be the end of the matter." Where, as here, a state has established a process for a defendant to seek discretionary, equitable review of his sentence after his conviction has become final, the state has established a form of "post-conviction or other collateral review" within the plain meaning of that phrase and that process should, as the First Circuit held, serve as a tolling mechanism.

Rhode Island further argues that because federal collateral review pursuant to 28 U.S.C. §§2254 and 2255 requires a legal challenge, "it would be incongruous to posit that Congress intended" a different definition in 28 U.S.C. §2244(d)(2). Pet'r Br. 25-26.

All of these forms of relief are in addition to direct appeals. All follow conviction. They illustrate the wide variety of "State post-conviction or other collateral review" processes that, consonant with principles of federalism and comity, may serve as tolling mechanisms under 28 U.S.C. §2244(d)(2).

This argument, however, ignores a key distinction between the requirements for federal review and the requirements for tolling. Interests of federalism and comity both constrain the scope of federal review of state proceedings and support deference to a state's decision to provide both legal and discretionary, equitable judicial review. These interests not only require a claim of jurisdictional, constitutional, or fundamental error to support federal collateral review, but also support the inclusion of both legal and equitable state court post-conviction proceedings seeking relief from a conviction or sentence as tolling mechanisms. Tolling appropriately allows a defendant to seek the judicial relief the state has made available without sacrificing the ability to seek federal review of federal constitutional issues should state relief be inadequate.

In view of the foregoing, this Court should reject Rhode Island's effort to define "collateral review" in the AEDPA's tolling provision as requiring a legal challenge to a conviction or sentence.

C. Rhode Island's Attempt to Limit Collateral Review in the AEDPA's Tolling Provision to Legal Challenges to Judgments Is Not Supported by the Precedent It Cites.

Citing a number of pre-AEDPA cases in which the Court used the term "collateral review" in connection with state court proceedings where a

defendant raised a legal challenge to his state court conviction or sentence, Rhode Island argues that these cases demonstrate that "collateral review" as used in the AEDPA's tolling provision requires such a legal challenge. Pet'r Br. 21-23. However, these cases do not address or resolve the issue presented in this case. The question to be answered here is not whether state court proceedings in which defendants bring *legal* challenges to their convictions or sentences following direct appellate review constitute collateral review (unquestionably, they do), but whether state court proceedings in which defendants bring *equitable* challenges to their sentences seeking discretionary relief following direct appellate review *also* constitute collateral review.[9] On this question the cases cited by Rhode Island provide no answer.

The use of the phrases "collateral review" and "legal challenge" in the context of litigation in which a legal challenge has, in fact, been brought on collateral review is not definitional but merely descriptive.

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[9] Rhode Island's suggestion that there is a settled common law meaning to the term "collateral review," Pet'r Br. 20-23, ignores the multiple contexts of the term's use. As this Court concluded in *Moskal v. United States*, 498 U.S. 103 (1990), in discussing whether Congress had adopted a particular common law meaning of an undefined term used in a statute, where a term used at common law had more than one meaning, there was no presumption that Congress had adopted the particular meaning urged by the defendant. *Id.* at 116-117; *see also Evans v. United States*, 504 U.S. 255, 259-269 (1992) (evaluating effect of congressional use of common law term "extortion" in defining elements of Hobbs Act extortion under color of official right).

Indeed, in Rhode Island's quotations from *Schad v. Arizona*, 501 U.S. 624 (1991), *Parker v. Dugger*, 498 U.S. 311 (1991), *Jones v. Barnes*, 463 U.S. 745 (1983), *Murray v. Carrier*, 477 U.S. 478 (1986), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Lockhart v. Nelson*, 488 U.S. 33 (1988), and *Florida v. Burr*, 496 U.S. 914 (1990) (Stevens, J., dissenting from denial of certiorari), *see* Pet'r Br. 22-23, the Court simply used the term "collateral review" in describing the procedural history of the case; it did not purport to define the scope of the term itself. In *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (concurring opinion of Powell, J.), and in *Rector v. Bryant*, 501 U.S. 1239, 1243 n.2 (1991) (dissent from denial of certiorari by Marshall, J.), the two justices merely described the availability of collateral review of convictions and sentences or its availability to address trial errors.

The Court's use of the terms highlighted by Rhode Island in the other cases it cites at pages 22-23 of its brief similarly sheds no light on whether state provisions for equitable relief are tolling mechanisms within the meaning of 28 U.S.C. §2244(d)(2). Again, there is no suggestion in any of those cases that the Court was purporting to limit the definition of "collateral review" to review presenting substantive legal challenges. Moreover, a number of them also include discussions concerning respect for state processes and the principles of federalism and comity – discussions that support, rather than reject, the inclusion of discretionary, equitable remedies within the scope of "post-conviction or other collateral review."

For example, Rhode Island seeks support from the remark in *Coleman v. Thompson*, 501 U.S. at 755, that "state collateral review is the first place a prisoner can present a challenge to his conviction." Pet'r Br. 22. It extracts this phrase from a discussion of whether there should be an exception to the rule that there is no right to counsel in state collateral proceedings "*in those cases where* state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755 (emphasis supplied). Thus, the Court was not suggesting that collateral review was defined by a legal challenge, but simply stating that, under some state systems, collateral review was the first place certain challenges could be brought. The *Coleman* Court also recognized the importance of state rules and respect for the state's interest in compliance with its rules. *Id.* at 739. *Coleman*, with its emphasis on state procedures and sovereignty, does not support the narrow reading of §2244(d)(2) urged by Rhode Island. By tying tolling to state-determined post-conviction procedures, §2244(d)(2) furthers the goals of federalism and comity.

Rhode Island's reliance on *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Engle v. Isaac*, 456 U.S. 107 (1982), is similarly misplaced. *O'Shea* was a civil rights action in which the Court simply listed post-conviction collateral review as among the procedures for addressing discriminatory conduct. 414 U.S. at 502. The Court also discussed the need to respect state administration of its own law and "established

principles of comity." *Id.* at 499-501; *see also Murray v. Carrier*, 477 U.S. at 490-491 (discussing respect for state court rules and procedures). Similarly, in *Engle*, the Court stated in the course of noting that respondents had exhausted their state remedies that Ohio provides "only limited collateral review of convictions." 456 U.S. at 124 n.28 (quoted at Pet'r Br. 22). Yet, the Court also discussed principles of comity and finality in holding that state prisoners could not challenge the constitutionality of jury instructions in a federal habeas corpus proceeding where they had not complied with state court contemporaneous objection requirements absent compliance with the cause and prejudice standard. *Id.* at 134-135.

Other cases cited by Rhode Island, *see* Pet'r Br. 22-23, support Mr. Kholi's position that collateral review is review distinct from direct review. In *Castille v. Peoples*, 489 U.S. 346, 350 (1989), while discussing "recourse to state collateral review" in the context of the exhaustion requirement, the Court also distinguished between direct and collateral review in terms of the timing or order of proceedings. After noting the availability of collateral review to rectify an error in *Shea*, 470 U.S. at 59-60, the Court spoke of collateral review in the temporal sense, as review following direct review. And in *Wainwright v. Sykes*, 433 U.S. 72, 115 (1977), Justice Brennan (in dissent) not only spoke of collateral review as a means of correcting error, but also distinguished between collateral review and appeal. *See also United States v. Addonizio*, 442 U.S. 178, 184-185 (1979) (suggesting

temporal distinction between direct and collateral review), *cited at* Pet'r Br. 26 n.15. The temporal distinctions made in these opinions support a conclusion that a Rhode Island Rule 35 motion seeking equitable sentencing relief, which occurs after judgment or after direct appellate review, is a collateral challenge.

Rhode Island also notes habeas cases decided after the AEDPA's enactment in which the Court used the term "collateral review" in cases involving legal challenges to state convictions. Pet'r Br. 24 n.13. These cases, like those discussed above, do not purport to define "collateral review" in the context of the AEDPA's tolling provision. Again, the Court's use of the terms "legal challenge" and "collateral review" while discussing the merits of collateral review addressing a legal challenge, is hardly unexpected. Nor is it determinative of the issue in this case.[10]

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[10] Rhode Island also seeks support for its limiting interpretation in various circuit court decisions in federal habeas cases. Pet'r Br. 30-31. With the exception of the decisions creating the circuit split presented in this case, they do not express any views on the classification of discretionary, equitable post-conviction review as a tolling mechanism.

Indeed, the court's focus in *Streu v. Dormire*, 557 F.3d 960 (8th Cir. 2009), on considerations of comity in holding that a motion to reopen state post-conviction proceedings did toll the AEDPA limitation period, even if it did not directly seek relief from the judgment, and its rejection of the argument that tolling applications should be limited to those necessary to exhaust state remedies, supports Mr. Kholi's analysis.

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In *Harrelson v. Swan*, No. 08-41112, 2010 WL 2340827, at *2 (5th Cir. June 10, 2010) (determining that nunc pro tunc proceedings did not seek review of the original judgment and, therefore, did not toll the AEDPA limitation period), the court described tolling proceedings as those that "must at least have sought 'review' of the judgments pursuant to which [defendant] was in custody." It defined "review" as "to *reexamine* judicially and to *go over or examine* critically or deliberately." *Id.* (internal quotation marks and citation omitted). Again, this supports Mr. Kholi's analysis.

In *Godfrey v. Dretke*, 396 F.3d 681, 688 (5th Cir. 2005), the court simply concluded that a state application directly challenging the validity of an expired conviction used to enhance a later sentence, without challenging its use in the enhanced sentence, "did not challenge a 'pertinent judgment or claim' within the meaning of §2244(d)(2)."

The state filings discussed in *Sindar v. Turley*, 343 F. App'x 326, 328 (10th Cir. 2009), in the context of denying a certificate of appealability were an application for a protective order and "malfeasance in office" complaints against a state court judge, the prosecutor in his case and his initial defense counsel. The court held these did not toll the limitation period since "none of [them] sought post-conviction relief for himself or collateral review of the judgment against him."

Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010), merely addressed whether a state habeas corpus petition presenting legal challenges to the defendant's conviction was pending "[u]nder California's unusual system of independent collateral review."

In sum, in none of these cases was a court called upon to address whether an application for discretionary, equitable judicial relief would toll the AEDPA's limitation period; in none of these cases did a court suggest that such an application would not toll the period. Indeed the discussion of the relevance of comity in *Streu* and the definition of "review" in *Harrelson* support the inclusion of discretionary, equitable relief in the scope of "post-conviction and other collateral review."

That federal collateral review pursuant to either 28 U.S.C. §2254 or §2255 requires a legal challenge in the form of jurisdictional, constitutional, or fundamental error resulting in a miscarriage of justice, *see* Pet'r Br. 25-28, speaks only to the requirements for obtaining relief from final judgments under those provisions. The inclusion of such a requirement in §2254 demonstrates respect for state processes. It does not suggest that respect for state processes requires excluding post-conviction discretionary sentencing relief from the array of tolling mechanisms recognized in 28 U.S.C. §2244(d)(2).

Similarly, Rhode Island's contention that the use of the term "collateral review" in 28 U.S.C. §§2244(b)(2)(A) and 2244(d)(1)(C) "evidences [congressional] intent to define the term as a vehicle for challenging a judgment of conviction or sentence," Pet'r Br. 28, again ignores context. Both of those provisions refer to the type of claim that may be raised in a federal habeas proceeding, which, as noted above, is a proceeding requiring a legal challenge. Moreover, the limitation on the nature of claims that may be brought in a second federal proceeding, *see* §2244(b)(2)(A), and the limitation of the availability of review to newly recognized constitutional rights only where this Court has determined they should be retroactively available on collateral review, *see* §2244(d)(1)(C), are consistent with the recognition of state interests in finality. And, where the state has made discretionary, equitable post-conviction judicial relief available, such relief cannot be deemed inconsistent with the state's interest in finality.

The context of language is important. *See, e.g.*, *Moskal*, 498 U.S. at 108 (stating that "the meaning of language is inherently contextual"). In the cases cited by Rhode Island, the Court discussed or mentioned collateral review in the context of reviewing federal habeas corpus proceedings. Such proceedings are collateral and, by statute, must present legal challenges. It is only to be expected that those cases would involve discussions of legal challenges. It could not be otherwise. But the fact that habeas review is collateral review does not mean that collateral review is limited to habeas review, let alone that all "post-conviction or other collateral review" is so limited. Accordingly, the use of the term "collateral review" in discussions of legal challenges in the review of federal habeas corpus proceedings cannot be deemed to define the scope of collateral review in post-conviction state court proceedings for purposes of defining available tolling mechanisms.

II. POLICY CONSIDERATIONS SUPPORT THE CONCLUSION THAT A MOTION PURSUANT TO A STATE PROVISION AUTHORIZING SENTENCING RELIEF FOLLOWING FINAL JUDGMENT IS AN "APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW."

A defendant should be entitled to pursue available state procedures for relief from a conviction and/or sentence, whether that relief is discretionary or mandatory, equitable or legal. If he acts in compliance

with state time limits authorizing the filing of applications for state review within the year following final judgment, the time during which those applications are pending should be tolled for purposes of determining the later availability of federal habeas relief. Principles of comity and federalism, considerations of predictability and clarity, and the interests of the AEDPA all support including motions for discretionary, equitable post-conviction sentencing relief as tolling mechanisms under 28 U.S.C. §2244(d)(2).

As set forth in Argument I.B., *supra*, principles of federalism and comity support an interpretation of "post-conviction or other collateral review" that allows a defendant to pursue all available avenues of relief from a final judgment in the state court without forfeiting the right to file a petition for habeas corpus relief in the federal court. Consistent with the requirements of the United States Constitution, states have the right to choose the remedies and review processes they will offer to those convicted of state offenses. Federal courts should respect those choices.

Just as importantly, affording a state the opportunity to rectify any errors and/or determine whether discretionary relief is warranted may eliminate the need for federal review altogether. A defendant who has obtained relief by pursuing state remedies, equitable as well as legal, might not seek federal habeas review, thus conserving limited federal judicial resources. A sentence reduction resulting in a defendant's release could obviate the need for

subsequent federal action. It may not always be easy to quantify the positive impact on the federal system of respecting the myriad ways in which states may remedy unlawful or unjust convictions and/or sentences, but the impact should nonetheless be considered. In Rhode Island, for example, the state has determined that, among available post-conviction remedies, a defendant should have an opportunity to seek legal or equitable relief from his/her sentence within 120 days after the direct appeal has been concluded. As demonstrated by a study of Rule 35 motions filed in Rhode Island between 1998 and 2003, which shows that 31% of those motions acted upon were granted,[11] Rule 35 provides a viable form of post-conviction or other collateral review in practice as well as in theory.

Considerations of predictability and clarity also support including motions for discretionary sentencing relief as tolling mechanisms. In enacting the AEDPA, Congress sought to provide bright-line rules for the initiation of federal habeas corpus proceedings. Section 2244 sets out procedures and requirements for filing applications, including a period of limitation in §2244(d)(1) and a provision for tolling that period of limitation in §2244(d)(2). The Court

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[11] Laura Braslow & Ross E. Cheit, *Appropriate Leniency or Worrisome Discretion? A Systematic Study of Motions to Reduce Criminal Sentences in Rhode Island Superior Court (1998-2003)*, 2nd Annual Conference on Empirical Legal Studies Paper, *available at* http://ssrn.com/abstract=998727.

recognized such a bright-line rule when it held that a federal court does not look to the merits of a state court application to determine whether it tolls the AEDPA's time limitations; the federal court simply asks whether the state application was properly filed, *i.e.*, whether it was procedurally acceptable to the state court clerk's office. *Artuz*, 531 U.S. at 8-9.

Rhode Island's contention that tolling must be limited to those applications presenting a legal challenge to a conviction or sentence would create unpredictability and defeat clarity. It would require a parsing of the language of each motion where, as in Rhode Island and in other states, a rule authorizes both a challenge to the legality of a sentence and discretionary, equitable relief in the same section of a provision,[12] or within the same provision.[13] For example, the motion filed in this case was captioned "Motion to Reduce Sentence" and cited "the provisions of Rule 35 of the Rules of Criminal Procedure of the Superior Court." J.A. 8. Rule 35(a) provides for the correction of an illegal sentence and a sentence

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[12] *See* Ga. Code Ann. §17-10-1(f); Idaho R. Crim. P. 35; Minn. R. Crim. P. 27.03(9); N.M. R. Crim. P. 5-801; S.D. Codified Laws §23A-31-1.

[13] *See* Alaska R. Crim. P. 35; D.C. Super. Ct. R. Crim. P. 35; Ark. Code Ann. §16-90-111; Colo. R. Crim. P. 35; Del. Super. Ct. R. Crim. P. 35; Fla. R. Crim. P. 3.800; Haw. R. Penal P. 35; Me. R. Crim. P. 35; Md. Rule 4-345; N.D. R. Crim. P. 35; Vt. R. Crim. P. 35; W. Va. R. Crim. P. 35; Wyo. R. Crim. P. 35. See also Mass. R. Crim. P. 29, Tenn. R. Crim. P. 35, and Conn. Super. Ct. R. P. §43-21 for other discretionary sentencing-relief provisions.

imposed in an illegal manner, as well as for the discretionary reduction of a sentence. A federal court could not determine whether a defendant sought legal or equitable relief without further examination of the document filed. Examination of applications might also require the federal court to refer to state rules concerning the construction of *pro se* pleadings and to make judgments about whether the language of each application sought legal, equitable, or mixed relief.

Requiring district courts to examine each state court motion alleged to toll the AEDPA's limitation period to determine whether it sought legal or equitable relief not only would impose an additional burden on the district courts, but would create the unpredictability and lack of uniformity the Court has sought to avoid, not only under the AEDPA, as discussed above, but in other contexts as well. For example, in determining whether an offense is a crime of violence or violent felony for various sentencing purposes, the Court has used a categorical approach, examining the formal elements of the offense of conviction rather than examining the facts of the actual offense. *Begay v. United States*, 553 U.S. 137 (2008); *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990). So too here, an approach that examines only whether a state court motion was properly filed and sought available judicial relief from a state court judgment apart from direct appellate review would be consistent with the plain meaning of 28 U.S.C. §2244(d)(2), and would provide a predictable rule furthering the interests of

federalism and comity without impinging upon legitimate concerns of finality, or placing an increased burden on federal district courts.

Finally, Rhode Island and its amici argue that tolling the AEDPA's limitation period for motions seeking a discretionary reduction of sentence does not promote exhaustion of state remedies and undermines the interests of finality. Pet'r Br. 36-43; Amici Br. 19-27. Indeed, amici suggest that promoting exhaustion is the only function of tolling. Amici Br. 19-23. That suggestion is untenable. The Court has recognized a relationship between exhaustion and tolling, but that relationship does not exclude all other considerations. Exhaustion of state remedies is not the only reason for the AEDPA's tolling provision. Comity and federalism play a significant role. Consistent with this role, as set out above, courts have recognized that post-conviction applications in state courts raising only state law issues can serve as tolling mechanisms under 28 U.S.C. §2244(d)(2). A construction of the tolling provision that respects all of the judicial processes a state provides to address all aspects of a state judgment within the state court system before federal review is sought furthers the AEDPA's interests in comity and federalism, as well as in finality as defined by the state.

The contentions of Rhode Island and its amici invoking finality also ignore the fact that 28 U.S.C. §2244(d)(2) addresses a state court judgment, and that it is the state that has provided the post-conviction mechanism for seeking equitable relief.

Indeed, in *Danforth v. Minnesota*, the Court averred that "finality of state convictions is a *state* interest, not a federal one," and reiterated that "[s]tates are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." 552 U.S. at 280. While one of the aims of the AEDPA is to promote finality, *see, e.g.*, *Duncan*, 533 U.S. at 179 (citing *Calderon v. Thompson*, 523 U.S. 538, 555-556 (1998)), it is finality as defined by the *state* that the statute is designed to protect. Where Rhode Island has already determined that its interest in the finality of state convictions is not affronted by allowing a defendant to seek a discretionary, equitable reduction of his sentence from the state court, no federal interest is infringed by recognizing an application for such relief as a tolling mechanism.

In sum, policy considerations as well as the statutory language of §2244(d)(2) support the First Circuit's determination that a motion for discretionary, equitable sentencing review is an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" and, therefore, tolls the one-year period of limitation provided in §2244(d)(2).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JUDITH H. MIZNER
Counsel of Record
FEDERAL DEFENDER OFFICE
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061
Judith_Mizner@fd.org

APPENDIX

The relevant proceedings in the courts of the State of Rhode Island and the federal district court are set out here in table form:

12/15/1993	Conviction	R.I. Superior Ct.
02/28/1994	Sentence	R.I. Superior Ct.
02/29/1996	Conviction affirmed	R.I. Supreme Ct.
05/16/1996	Rule 35 motion to reduce filed	R.I. Superior Ct.
08/27/1996	Rule 35 motion to reduce denied	R.I. Superior Ct.
05/23/1997	PCR application filed	R.I. Superior Ct.
01/16/1998	Rule 35 denial affirmed	R.I. Supreme Ct.
04/23/2003	PCR application denied	R.I. Superior Ct.
12/14/2006	PCR denial affirmed	R.I. Supreme Ct.
09/05/2007	Federal habeas petition filed	U.S. District Ct.

REPLY BRIEF

No. 09-868

In The Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

PATRICK C. LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L. WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R. BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag.ri.gov

Attorneys for Petitioner
A.T. Wall

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. RESPONDENT KHOLI RECOGNIZES THAT IN ORDER TO QUALIFY FOR § 2244(D)(2) TOLLING, THE SENTENCE-REDUCTION MOTION AT ISSUE MUST CONSTITUTE AN APPLICATION FOR "COLLATERAL REVIEW"[1]

Until reading the *Brief for Respondent Khalil Kholi* ("*Resp. Br.*"), which seems to read the First

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[1] To be clear, the relevant state court application filed by Kholi in the Rhode Island Superior Court was "a [Rule 35] motion ... to reduce an imposed sentence that seeks purely discretionary leniency and *does not challenge the validity of the conviction or sentence*" (*Kholi v. Wall*, 582 F.3d 147, 156 (1st Cir. 2009) (emphasis added). Respondent Kholi, by repeatedly referring, no fewer than forty times, in his *Respondent's Brief* to this plea for discretionary sentence leniency as a request for "equitable" sentencing relief (even rephrasing the Question Presented by replacing the clause "sentence-reduction motion consisting of a plea for leniency" (*Pet. Br.* i) with "discretionary, *equitable* modification of a criminal judgment and sentence") (*Resp. Br.* i) (emphasis added)), raises the specter that Kholi's Rule 35 motion might have advanced some legal challenge to his sentence. *See Black's Law Dictionary* 558 (7th ed. 1999) (defining "equitable" as "1. Just; conformable to principles of justice and right. 2. Existing in equity; available or sustainable by an action in equity, or under the rules and principles of equity."). Since neither the below panel decision nor the circuit split this Court, presumably, granted certiorari to resolve, concerned an "equitable" sentencing relief application, and since an "equitable" sentencing relief application might well not be equivalent to, and present an altogether different analysis than does, a "motion to reduce an imposed sentence, in the nature of a plea for discretionary leniency" (*Kholi*, 582 F.3d at 149), the "equitable" sentencing relief formulation utilized by Respondent would appear to be particularly unhelpful.

Circuit's below panel decision to say that only state applications seeking "collateral review" of criminal judgments toll the one-year limitations period of 28 U.S.C. § 2244(d)(1),[2] Petitioner Wall had thought it evident that the basis of the First Circuit's holding – that a Rhode Island Rule 35(a) "plea for discretionary leniency" (*Kholi*, 582 F.3d at 155) qualified as § 2244(d)(2) "State post-conviction or other collateral review" – was predicated upon its determination that such sentence reduction leniency plea constituted "State post-conviction ... review,"[3] *irrespective of whether* the sentence reduction application could be

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[2] *See Resp. Br.* 5 (stating that the *Kholi* panel "noted that a motion for sentencing leniency would be 'collateral' within the general meaning of the term"); *id.* at 4 n.2 ("Rhode Island's assertion that the First Circuit read § 2244(d)(2) as permitting tolling for 'even *non*-collateral state court post-conviction applications,' Pet'r Br. 13, ignores the context of the statement.") (emphasis in original).

[3] *See Kholi*, 582 F.3d at 152 ("The Rule 35(a) motion is obviously a motion that seeks *state post-conviction review* of that sentence") (emphasis added); *id.* at 153 ("it seems self-evident that a motion for a sentence reduction in the nature of a plea for discretionary leniency is a motion that seeks *post-conviction 'review'* of a sentence") (emphasis added); *id.* at 149 (framing question presented as whether "a state-court post-conviction motion to reduce an imposed sentence, in the nature of a plea for discretionary leniency ... fall[s] within the scope of th tolling provision."); *id.* at 155 ("After all, [a sentence reduction motion] ... initiates a separate post-conviction proceeding"); *id.* at 156 ("The plain meaning [of § 2244(d)(2)] ... indicates that a state post-conviction motion for a sentence reduction, in the nature of a plea for discretionary leniency, comes within the statutory sweep.").

characterized as "collateral review." *See Kholi*, 582 F.3d at 153 (disagreeing with the Fourth Circuit's view "that the statutory phrase 'State post-conviction or other collateral review' contemplates only '*collateral*, post-conviction review.'") (*quoting Walkowiak v. Haines*, 272 F.3d 234, 236 (4th Cir. 2001) (emphasis in original); *id.* at 153 ("The plain meaning of the statute is not altered by the fact that a post-conviction motion is not 'collateral,' that is, that the motion is filed in the original criminal case."); *id.* at 154 n.6 ("We note that even if the tolling provision is conflated to apply only to applications for *collateral* review – *an interpretation that we reject* – [Kholi's] Rule 35(a) motion would likely qualify.") (second emphasis added).

In any event, as Respondent Kholi, like Petitioner Wall (*Petitioner's Brief* ("*Pet. Br.*") 18-19), recognizes that "[t]hrough the use of the word 'other,' Congress included post-conviction review as a form of collateral review" (*Resp. Br.* 7); *see also id.* at 13 ("Post-conviction review, by the plain words of the statute, must be a form of collateral review."),[4] both

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[4] *See also Resp. Br.* 12 ("If meaning and effect is given to each word of the phrase 'post-conviction or other collateral review,' ... 'post-conviction' must be construed as a type of collateral review."); *id.* ("The Court observed [in *Duncan v. Walker*, 533 U.S. 167, 177 (2001)] that 'Congress also may have employed the construction "post-conviction or other collateral" in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction.'").

parties are now in agreement that the disposition of this case comes down to the meaning of the term "collateral review."

II. RESPONDENT KHOLI'S PROPOSED CONSTRUCTION OF "COLLATERAL REVIEW" IS UNTENABLE

As Petitioner Wall reads the *Brief for Respondent Khalil Kholi*, Respondent Kholi understands the phrase "collateral review," not as *necessarily* comprehending a state court review proceeding capable of entertaining *legal challenges* to a state court judgment of conviction or sentence (*Resp. Br.* 14-15) ("'collateral review' may, *or may not*, include a legal challenge") (emphasis added), but, rather, as merely referring temporally (in time) to any post-judgment criminal proceeding *other than* one in the "*direct* review" (*id.* at 17) (emphasis added) process.[5] Respondent Kholi appears to posit

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[5] *See Resp. Br.* 17 ("'collateral review' of a judgment is review other than review of a judgment in the direct appeal process."); *id.* ("Review apart from direct appeal[,]" "review under-taken after a judgment has become final."); *id.* at 17-18 ("Construing the term 'collateral review' in 28 U.S.C. § 2244(d)(2) as concerned with the timing of an application rather than simply the nature of the review sought (legal or equitable)"); *id.* at 18 (review undertaken "after the judgment has become final"); *id.* at 25 (an application qualifies as "collateral review" "[w]hether or not a particular state-authorized avenue of relief available after the conclusion of a direct appeal seeks legal or discretionary, equitable relief"); *id.* at 29 ("challenges ... seeking ... relief following direct appellate review"); *id.* at 32 ("'collateral review' in the temporal sense, as review following direct

(Continued on following page)

both a statutory-language-based reason for this interpretation of the phrase "collateral review," and a decisional-based one.[6]

The statutory-language-based reason is that, if one were to break-up the phrase "collateral review" into its constituent words – "collateral" and "review" – and give to each of those words their "dictionary definitions" (*Resp. Br.* 15), "collateral review" would, in that event, not necessarily comprehend a state court proceeding in which a prisoner mounts a legal challenge to his or her judgment of conviction or sentence (*id.* at 16-17, 20). The evident weakness

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review"); *id.* at 33 ("collateral review" is "temporal[ly] distinct[ ]" from direct review, and is review "which occurs after judgment or after direct appellate review"); *id.* at 40 ("an approach that examines only whether a state court motion was properly filed and sought available judicial relief from a state court judgment apart from direct appellate review").

[6] Unlike his reading of "collateral review," Respondent Kholi presumably recognizes that the phrase "State post-conviction ... review," 28 U.S.C. § 2244(d)(2), *does* comprehend a legal-challenge review proceeding. (*See Black's Law Dictionary* 1186 (7th ed. 1999), which defines a "postconviction-relief proceeding" as "[a] state or federal procedure for a prisoner to request a court to vacate or correct a conviction or sentence. – also termed *postconviction-remedy proceeding*; *PCR action*," and this Court in *Duncan*, 533 U.S. at 177-78, seemed not to find any difference between the words "relief" and "review.") Of course, if this presumption is justified, and if Petitioner Wall had correctly read the *Kholi* panel's decision as resting singularly upon the phrase "State post-conviction ... review," then even Respondent Kholi must acknowledge that the First Circuit erred by predicating its disposition upon the phrase "State post-conviction ... review."

with this contention, though, is that it incomprehensibly presumes that Congress intended that the *phrase* "collateral review," used – as Respondent Kholi recognizes (*Resp. Br.* 35-36) – in numerous other provisions of the AEDPA (even other *sub*sections of the very § 2244 under consideration) to denote "a proceeding requiring a legal challenge" (*Resp. Br.* 35),[7] a proceeding which "*must* present legal challenges" (*id.* at 36) (emphasis added),[8] should be interpreted entirely differently in § 2244(d)(2), by being pulled asunder, with each word to be examined by

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[7] *See* § 2244(b)(2)(A) (claim that "relies on a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court, that was previously unavailable" is excepted from "second or successive" bar) (emphasis added); § 2244(d)(1)(C) (one-year limitations period may run from "date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on *collateral review*") (emphasis added); § 2254(e)(2)(A)(i) (exception for undeveloped claim that "relies on ... a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court") (emphasis added); § 2255 (one year limitations period applicable for federal prisoners may run from "date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on *collateral review*") (emphasis added); *id.* (claim that relies on "a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court" is excepted from "second or successive" bar) (emphasis added).

[8] *See also Resp. Br.* 27-28 ("collateral review pursuant to 28 U.S.C. §§ 2254 and 2255 requires a legal challenge"; "require a claim of jurisdictional, constitutional, or fundamental error to support federal collateral review").

resort to a dictionary. Since the normal rule of statutory construction instructs that identical language used in different parts of the same statute is generally presumed to have the same meaning (*see, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)), it simply cannot be that Congress, in §§ 2244(b)(2)(A), 2244(d)(1)(C), 2254(e)(2)(A)(i), and 2255 of the AEDPA, understood "collateral review" as a phrase denoting "a proceeding requiring a *legal* challenge" (*Resp. Br.* 35) (emphasis added), but intended an altogether different meaning – any temporal post-judgment criminal proceeding distinct from "direct review" (*Resp. Br.* 17-18, 25, 29, 32-33, 40), a meaning derived from a dictionary examination of each word – in § 2244(d)(2) only.

Moreover, Respondent Kholi's temporal-only construction would anomalously result in classifying certain state court applications as collateral, even before the judgment of conviction or sentence had become final. *See Resp. Br.* 18 (indicating that a Rhode Island Rule 35(a) sentence reduction motion, at issue in this case, filed immediately after sentencing, would be a "collateral review" application). Such a construction is inconsistent with a habeas corpus statute of limitations that begins to run only *after* a judgment has become final. *See* § 2244(d)(1). Respondent Kholi's statutory-language-based reason for his interpretation of "collateral review," then, cannot withstand scrutiny, even putting to the side the whole question of this Court's established use of the phrase "collateral review" prior to the enactment of the AEDPA (discussed *infra* at 10-13).

The second reason Respondent Kholi gives to support his broad construction of § 2244(d)(2) "collateral review," is that the phrase's case-law use in connection with the phrase "direct review," indicates that "collateral review" should be taken to denote a temporal sense (*Resp. Br.* 17-18 ("concerned with the timing of an application")) only, to mean review "which occurs *after* judgment or after direct appellate review" (*id.* at 17) (emphasis added). As discussed above, however, since Congress did not, as even Respondent recognizes (*Resp. Br.* 27-28, 35-36), use the phrase "collateral review" in this temporal-only sense in the other provisions of AEDPA, and since such temporal-only construction would result – anomalously in a tolling provision that only begins to run upon entry of final judgment – in the classification as "collateral review" of some state applications filed even before final judgment, Kholi's decisional-based rationale does not hold up either.

Furthermore, while Respondent Kholi may be correct that "collateral review," as used in the case law in connection with the phrase "direct review," does have a temporal component, because Respondent Kholi recognizes, as he must, that the case law has used "collateral review" to describe legal-challenge state court proceedings (*Resp. Br.* 29), Kholi's decisional-based rationale actually supports Petitioner's construction of the phrase "collateral review" as including a post-judgment legal challenge proceeding only. If, that is, the way this Court has used the phrases "direct review" and "collateral

review" indicates the notion of temporalness, it also indicates the notion of legal challenge.

Thus, neither of Respondent Kholi's interpretative rationales for the construction of "collateral review" – the one predicated on the dictionary definition of the separately read words "collateral" and "review," the other on what may be gleaned from the decisions of this Court employing both the phrases "direct review" and "collateral review" – supports his contention that "'[o]ther collateral review' may, or may not, include a legal challenge." (*Resp. Br.* 15.) Respondent's construction, moreover, takes no issue with Petitioner Wall's contention that other sections of AEDPA use "collateral review" as a phrase denoting "a proceeding requiring a *legal* challenge" (*Resp. Br.* 35) (emphasis added),[9] a contention central to Petitioner Wall's construction of § 2244(d)(2) "collateral review" (*Pet. Br.* 25-27).

One basis upon which Petitioner Wall relies upon for his construction of "collateral review" that Respondent Kholi *does* take issue with, is the "presum[ption]

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[9] Respondent Kholi does try to explain why Congress might have intended "collateral review" to mean one thing in § 2244(d)(2) of the AEDPA, but an entirely different thing in the other AEDPA provisions in which the phrase was employed. (*See Resp. Br.* 28 (suggesting that Congress's comity-federalism concerns justify reading "collateral review" one way in § 2244(d)(2), and a different way in other AEDPA provisions where "federal review" concerns predominate); *id.* at 35-36 (same).) This explanation is unconvincing, as it raises more questions than it answers.

that Congress was fully aware that when this Court used the term 'collateral review' with respect to a state court proceeding, it did so, uniformly and evidently, to mean a collateral proceeding that challenges the *lawfulness* of a prior judgment of conviction or sentence" (*Pet. Br.* 21-22.) (emphasis in original). According to Respondent Kholi, merely because this Court's "pre-AEDPA cases ... use[d] the term 'collateral review' in connection with state court proceedings where a defendant raised a legal challenge to his state court conviction or sentence" (*Resp. Br.* 28-29), does not mean that such term can also not refer to a *non*-legal challenge vehicle. (*Resp. Br.* 28-36.)

Because, however, the phrase "collateral review" in connection with state (to say nothing of federal) court prisoner proceedings has *only* been used by this Court in reference to legal-challenge proceedings (*see* cases cited in *Pet. Br.* 20-25), because such phrase has *never* been used by this Court to refer to a sentence-leniency or such other non-legal challenge state court proceeding,[10] because the so called Powell Committee Report (Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989)) upon which a portion of AEDPA was based (*see Lindh v. Murphy*, 521 U.S. 320, 337 n.2 (1997)

[10] Petitioner Wall could find no such usage, ever, presumably, because no such usage was indicated in the *Brief for Respondent Khalil Kholi*. Respondent also could not uncover even one, ever.

(Rehnquist, C.J., dissenting)) evidently and repeatedly uses the term "state collateral review" in the legal-challenge proceeding sense,[11] because the courts of virtually every state have employed the phrase "collateral review" to refer to a state proceeding seeking the invalidation of conviction or sentence,[12]

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[11] *See, e.g.*, Powell Committee Report at Part II (B) (Second Paragraph), *supra* p. 10 ("In sum, the Committee believes that provision of competent counsel for prisoners under capital sentence throughout both *state and federal collateral review* is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.") (emphasis added).

[12] *See, e.g., State v. Glass*, 569 P.2d 10, 13 (Alaska 1979); *Ex parte Love*, 507 So.2d 979, 979 (Ala. 1987); *Ferguson v. State*, 521 S.W.2d 546, 548 (Ark. 1975) (Fogelman, J., concurring); *Wilson v. Ellis*, 859 P.2d 744, 748 (Ariz. 1993); *People v. Jackson*, 514 P.2d 1222, 1223 (Cal. 1973); *People v. Trimble*, 839 P.2d 1168, 1171 (Colo. 1992); *Gaines v. Manson*, 481 A.2d 1084, 1091 n.10 (Conn. 1984); *Bailey v. State*, 588 A.2d 1121, 1125 (Del. 1991); *Kleinbart v. U.S.*, 553 A.2d 1236, 1244 (D.C. 1989); *Garcia v. State*, 622 So.2d 1325, 1329 (Fla. 1993); *Jacobs v. Hopper*, 233 S.E.2d 169, 170 (Ga. 1977); *Hernandez v. State*, 905 P.2d 86, 87 (Idaho 1995); *People v. Strickland*, 609 N.E.2d 1366, 1390 (Ill. 1992); *Morgan v. State*, 469 N.W.2d 419, 422-23 (Iowa 1991); *State v. Neer*, 795 P.2d 362, 367 (Kan. 1990); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1294 (La. 1992); *Kimball v. State*, 490 A.2d 653, 658 (Me. 1985); *Thanos v. State*, 632 A.2d 768, 779 (Md. 1993) (Rodowsky, J., concurring in part and dissenting in part); *Commonwealth v. Szczuka*, 600 N.E.2d 575, 577 (Mass. 1992); *People v. Reed*, 535 N.W.2d 496, 503 (Mich. 1995); *State ex rel. Roy v. Tahash*, 152 N.W.2d 301, 304-05 (Minn. 1967); *State v. Read*, 544 So.2d 810 (Miss. 1989); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 443, 445 (Mo. 1993); *State ex rel. Turner v. Montana Third Judicial Dist. Court, Powell County*, 897 P.2d 1060, 1061-62 (Mont. 1995); *State v. Eutzy*, 496 N.W.2d 529, 531 (Neb. 1993); *Snow v. State*, 779 P.2d 96, 97 (Nev. 1989); *Avery v. Cunningham*, 551 A.2d 952, 954-55 (N.H. 1988); *State v Preciose*,

(Continued on following page)

and the federal appellate courts have used the phrase in precisely this same way,[13] it is entirely unreasonable to maintain that this Court's pre-AEDPA use of the phrase "collateral review" "provides no answer" (*Resp. Br.* 29) to whether this Court employed, in prisoner cases, the phrase "collateral review" to refer only to a state court legal-challenge vehicle. As Respondent Kholi, then, does not point to any decision, by any court, at any time, in which the term "collateral review" was used to refer to something

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609 A.2d 1280, 1287 (N.J. 1992); *Jones v. State*, 469 P.2d 717, 718-19 (N.M. 1970); *People v. Eastman*, 648 N.E.2d 459, 464-65 (N.Y. 1995); *State v. White*, 162 S.E.2d 473, 478 (N.C. 1968); *State v. Sneed*, 584 N.E.2d 1160, 1172 (Ohio 1992); *Robison v. State*, 818 P.2d 1250, 1252 (Okla. Crim. App. 1991); *Bryant v. Thompson*, 922 P.2d 1219, 1223 (Or. 1996); *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988); *Pailin v. Vose*, 603 A.2d 738, 741-42 (R.I. 1992); *Drayton v. Evatt*, 430 S.E.2d 517, 519 (S.C. 1993); *Archer v. State*, 851 S.W.2d 157, 163 (Tenn. 1993); *Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989); *Andrews v. Morris*, 677 P.2d 81, 83 (Utah 1983); *In re Dunham*, 479 A.2d 144, 148 (Vt. 1984); *State v. Brand*, 842 P.2d 470, 471 (Wash. 1992); *Losh v. McKenzie*, 277 S.E.2d 606, 609 (W.Va. 1981); *State v. Escalona-Naranjo*, 517 N.W.2d 157, 165 (Wis. 1994).

[13] *See, e.g., Robinson v. Ponte*, 933 F.2d 101, 102 (1st Cir. 1991); *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991); *Reynolds v. Ellingsworth*, 23 F.3d 756, 757 (3d Cir. 1994); *Bunch v. Thompson*, 949 F.2d 1354, 1366 (4th Cir. 1991); *Smith v. Black*, 970 F.2d 1383, 1385 (5th Cir. 1992); *Couch v. Jabe*, 951 F.2d 94, 97 (6th Cir. 1991); *Burris v. Farley*, 51 F.3d 655, 657 (7th Cir. 1995); *Prewitt v. Goeke*, 978 F.2d 1073, 1076 (8th Cir. 1992); *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991); *Brecheen v. Reynolds*, 41 F.3d 1343, 1349 n.4 (10th Cir. 1994); *Thomson v. Wainwright*, 714 F.2d 1495, 1504 (11th Cir. 1983); *Garris v. Lindsay*, 794 F.2d 722, 727 (D.C. Cir. 1986).

other than a recognized vehicle to challenge the validity of a conviction or sentence, it is simply implausible to suggest that Congress, in enacting § 2244(d)(2) of the AEDPA, meant to employ the term differently.[14] Indeed, given how the phrase "collateral review" was used prior (and subsequent) (*Pet. Br.* 24) to the 1996 enactment of the AEDPA, it strains credulity to posit that Congress, had it intended tolling to apply to "*all* of the judicial processes a state provides to address all aspects of a state judgment within the state court system before federal review is sought" (*Resp. Br.* 41) (emphasis added), would have settled upon the phrase "collateral review" to convey such an all-embracing conception.[15]

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[14] Although Respondent Kholi is of course correct that, "[w]ith the exception of the decisions creating the circuit split presented in this case," the other circuit courts of appeals have "not express[ed] any views" on whether the type of sentence reduction motion at issue in this case constitutes "collateral review" pursuant to § 2244(d)(2) of the AEDPA (*Resp. Br.* 33 n.10), the Petitioner's Brief at pp. 30-31, 34, did cite to decisions of the Second, Fifth, Eighth, and Ninth Circuit Courts of Appeals (and, at *Pet. Br.* 31, 34, to the leading treatises on habeas corpus and postconviction relief remedies) which indicate the understanding that a state "collateral review" proceeding *is* one seeking the invalidation of a state court judgment of conviction or sentence. Since the submission of the Petitioner's Brief, the United States Court of Appeals for the Seventh Circuit has expressed, even more categorically this same understanding. *See Price v. Pierce*, 617 F.3d 947, 950-51 (7th Cir. 2010) (indicating that only those state court proceedings which are "attack" vehicles, qualify as § 2244(d)(2) "collateral review").

[15] Indeed, *had* Congress wished to convey the "all of the judicial processes" (*Resp. Br.* 41) (emphasis added) construction

(Continued on following page)

III. THE POLICY ARGUMENTS MADE IN SUPPORT OF RESPONDENT KHOLI'S CONSTRUCTION OF "COLLATERAL REVIEW" DO NOT WITHSTAND SCRUTINY

The policy reasons advanced by Respondent Kholi in support of his construction of § 2244(d)(2) "collateral review," do not withstand scrutiny. Respondent Kholi recognizes, as he must, that his all-embracing "collateral review" construction is at odds with the AEDPA goal of "reduc[ing] delays in the execution of state and federal criminal sentences" (*Woodford v. Garceau*, 538 U.S. 202, 206 (2003)); he moreover recognizes (*Resp. Br.* 41) that his proposed construction does nothing to advance another critical AEDPA concern, "promot[ing] the exhaustion of state remedies" (*Duncan*, 533 U.S. at 178), since there is obviously no point in giving the state court "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights" (*Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)) when the state court application *concedes* the lawfulness of the judgment of conviction and sentence, and cannot be used to assert *any* legal claim, federal or otherwise.

Deprived of the two policy pillars underlying § 2244(d)(2)'s tolling provision (*Duncan*, 533 U.S. at 179 ("[t]he tolling provision of § 2244(d)(2) balances

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posited by Respondent Kholi, it could have simply provided that "the time during which any properly filed application for State court review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

the interests served by the exhaustion requirement and the limitation period."), Respondent Kholi resorts, somewhat as the panel decision below did (*Kholi*, 582 F.2d at 155-56), to notions of "our federalism" comity, even invoking this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), for what, in the habeas corpus context, is the quite startling conception that Congress intended to "afford respect for state processes" (*Resp. Br.* 21) by making sure that federal habeas corpus review of a state prisoner's sentence would not begin until the state prisoner has "avail[ed] himself of *all* state remedies[.]" (*Id.* at 24) (emphasis added). Respondent Kholi goes so far as to suggest that to interpret § 2244(d)(2) as have the Third, Fourth, and Eleventh Circuits Courts of Appeals, would be an affront to "[a] state's ... entitle[ment] to determine the opportunities for relief from criminal judgment ... that it will make available to its prisoners[,]" (*Resp. Br.* 8), a "[dis]respect [to] the state's determination that [all of its] ... remedies should be made available to state prisoners" (*id.* at 25), and would undermine the "'principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees'" (*id.* at 23 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008))).

Respondent Kholi's states-rights cry misses the mark. In the first place, the proper interpretation of

§ 2244(d)(2) is a matter for the federal courts,[16] charged with interpreting federal law in conformance with congressional mandate (*see, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 589 (1995)), not "respect[ing] th[e] choices" "states have [made in] ... choos[ing] the remedies and review processes they will offer to those convicted" (*Resp. Br.* 37). Moreover, of course, the fact that a state prisoner may find herself time-barred in *federal* court pursuant to *federal* statute, hardly annuls a state's criminal processes or procedure; whatever state remedies are available to a state prisoner remain available, *whether or not* the running of a *federal* limitations period bars that state prisoner from pursuing a *federal* action. Certainly, no argument could be made or case cited to support the fantastic notion that § 2244(d)'s limitations period should not be enforced until a state prisoner had first availed herself of every state remedy and process. Indeed, the "our federalism" comity

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[16] *See Clay v. U.S.*, 537 U.S. 522, 531 (2003) ("[F]inality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule."); *Summers v. Schriro*, 481 F.3d 710, 714 (9th Cir. 2007) ("Because the question of what constitutes direct review is intertwined with the question of when a decision on direct review becomes final, it makes sense to decide both questions by reference to uniform federal law."); *Foreman v. Dretke*, 383 F.3d 336, 338-39 (5th Cir. 2004) ("When addressing finality, we have previously discussed the intersection of AEDPA and state law. In so doing, we confirmed that AEDPA, not state law, determines when a judgment is final for federal habeas purposes.").

interest invoked by Respondent Kholi actually points in the other direction: As the *Younger* doctrine is concerned with protecting *a state* from premature federal interference (*see, e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 208 (1988)), no state would complain of federal interference when one of its prisoners has been shut out of federal court pursuant to § 2244(d).

Respondent Kholi further suggests as a matter of policy, much as the panel decision below did (*Kholi*, 582 F.3d at 155-56), that it makes sense to toll the running of § 2244(d)(1)'s limitation period until after all state processes and procedures have been concluded, because a "defendant who has obtained relief by pursuing state remedies ... might not seek federal habeas review, thus conserving limited federal judicial resources." (*Resp. Br.* 37.) Whether or not, however, an application is one for "State post-conviction or other collateral review," pursuant to § 2244(d)(2), is, as even Respondent Kholi recognizes (*Resp. Br.* 11), a matter of Congressional intent as expressed in § 2244(d)(2). If a particular state court application does not qualify as a § 2244(d)(2) tolling mechanism, it does not so qualify; there is no special tolling allowance for a state court application that might moot a later federal habeas corpus action. Indeed, if there is any state application that would moot a later federal habeas corpus action, it would be an application for commutation or clemency, yet it has been held that such petitions do *not* qualify as § 2244(d)(2) "other

collateral review" applications. *See Malcom v. Payne*, 281 F.3d 951, 960 (9th Cir. 2002) ("we conclude that a state prisoner's petition for clemency is not 'State post-conviction or other collateral review' and therefore does not toll AEDPA's limitations clock."); *Emehiser v. Kempf*, No. CV-05-456-C-MHW, 2007 WL 793833, at *4 (D. Idaho March 14, 2007) ("There is no authority indicating that a petition for commutation of sentence is part of the administrative appeal process or a 'state post-conviction or other collateral review' action under § 2244(d)(2) such that it would toll the federal statute of limitations."). Moreover, to the extent that § 2244(d)(2)'s tolling provision is concerned with "conserving limited federal judicial resources" (*Resp. Br.* 37), that concern is advanced by *enforcing* § 2244(d)'s limitations period as intended by Congress, as there are assuredly more § 2254 federal habeas corpus actions dismissed as time-barred than there are such potential actions "mooted" by the grant of favorable state relief.

Penultimately on the considerations of policy, the Respondent's Brief at 41 seems to echo the *Kholi* panel's view that it "would be [an] ... unseemly prospect [for a federal court to] ... review[ ] ... state-court convictions[ ] while parallel proceedings were still ongoing in state court" (*Kholi*, 582 F.3d at 155). Yet, as the cases set out in *Pet. Br.* at p. 39 n.27, and the *Amicus Brief* at p. 19 establish, there is nothing improper, let alone "unseemly" (*Kholi*, 582 F.3d at 155), about an ongoing state court proceeding

during the hearing of a fully exhausted § 2254 federal habeas corpus action. Indeed, the First Circuit itself seems to have expressed this very view (*see Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 77 (1st Cir. 2002) (disapproving of the "broad rule that federal courts must dismiss § 2254 petitions whenever the petitioner is in the process of adjudicating other, related claims in state courts.")), a view consistent with this Court's holdings in *Rhines v. Weber*, 544 U.S. 269, 273-79 (2005) (district court has some discretion to grant or deny a request to stay a habeas petition containing only exhausted claims), and *Lawrence v. Florida*, 549 U.S. 327, 334-35 (2007) (rejecting contention that it would be "awkward" for "state prisoners [to] have to file federal habeas applications while they have certiorari petitions from state postconviction proceedings pending before this Court.").[17] In all events, a rule prohibiting the litigation of exhausted federal constitutional issues in a § 2254 case, while any other relief is being sought in state court, would not only "severely limit the scope of the federal habeas corpus statute" (*U.S. ex rel. Gockley v. Myers*, 411 F.2d 216, 223 n.8 (3d Cir.

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[17] That no rule prevents a federal court from passing upon exhausted federal claims, even while state law claims are being litigated in state court, is further supported by § 2254(b)(2) of AEDPA, which is intended to reduce needless returns to state court by allowing district courts to substantively dismiss meritless but *unexhausted* claims.

1969)), but also needlessly delay a state prisoner's federal adjudication of fully exhausted constitutional law claims.

Finally, with respect to policy, Respondent Kholi argues that his construction of "collateral review" – to mean only temporally to any post-judgment criminal proceeding *other than* one in the "*direct* review" (*Resp. Br.* 17) (emphasis added) – is easier to apply than the "legal-challenge" formulation urged by Petitioner Wall and endorsed by the Third, Fourth, and Eleventh Circuit Courts of Appeals. (*Resp. Br.* 38-41.) This is plainly not so, as exemplified by Respondent's own discussion of his "collateral review" formulation as applied to Rule 35(a), and Rhode Island's Post-Conviction Relief Act (R.I. Gen. Laws § 10-9.1-1 *et seq.*) ("PCR Act"). With respect to Rule 35(a), since a sentence reduction motion may be filed under the Rule even before a direct appeal has been taken and the judgment becomes final (*see* Rule 35(a) (motion may be filed "within one hundred and twenty (120) days after the sentence is imposed")), a better argument could made, under Respondent Kholi's temporal, "other than direct review," formulation (*Resp. Br.* 17), that a Rule 35(a) motion is direct, than could be made for that it is collateral.[18] In any event, given the number of state procedural considerations

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[18] *See* the Fourth Circuit's persuasive explanation, in *Walkowiak*, 272 F.3d at 237, as to why West Virginia's comparable Rule 35 provision is "direct" and not "collateral review."

Respondent Kholi had to resort to in order to arrive at his "collateral" versus "direct" determination with respect to Rule 35 (*Resp. Br.* 18-19) (examining a number of Rhode Island state law factors), it cannot be said that his proposed "collateral review" formulation would be any easier for a federal court to apply than straightforwardly asking whether the sentence reduction motion presents a legal challenge to the sentence.[19] And while, under the legal-challenge conception endorsed by the Third, Fourth, and Eleventh Circuits, and advocated by Petitioner Wall, an application pursuant to Rhode Island's PCR Act is certainly a tolling event, indeed it is a quintessential

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[19] Respondent Kholi also questions whether, under a criminal procedural rule like Rhode Island's Rule 35(a), where an application for sentence reduction and for correction of an illegal sentence is provided for in the same subsection of the Rule, it might be too difficult in a given case for a federal court to determine the sentencing relief that was actually sought in state court. (*Resp. Br.* 39-40.) Of course, that scenario is not present in this case, nor in the cases comprising the circuit split; all such cases involve motions for discretionary sentence leniency (*see Kholi*, 582 F.3d at 155 ("a state-court sentence reduction motion in the nature of a plea for discretionary leniency ... not present[ing] a claim premised on an error of federal law"). Moreover, like Rhode Island's Rule 35(a), the federal Pre-Sentencing-Guidelines Rule 35 had for many years, until the 1979 amendment, also contained within the same subsection the provision for correction and reduction of sentence (*see, e.g., U.S. v. Cervallos*, 538 F.2d 1122 n.10 (5th Cir. 1976)), and Respondent Kholi presents no evidence that, until the 1979 amendment, the federal district courts had difficulty deciphering whether a prisoner was requesting sentence leniency, or asserting that her sentence was unlawful.

tolling vehicle (*Pet. Br.* 32-34), under Respondent Kholi's construction of "collateral review," it would be necessary, again, to delve into matters of state procedural law (*see Resp. Br.* 19 n.6 (examining whether the PCR was heard by the same judge or not)) to determine whether such PCR application was "direct" or "collateral."[2] If ease of application should factor into the interpretation of § 2244(d)(2) "collateral review," then Respondent's formulation is inferior to the legal-challenge formulation endorsed by Third, Fourth, and Eleventh Circuit Courts of Appeals.

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[2] Of course, the reason a "collateral review" application tolls even if no federal law *claim* is presented within the *application* (*see* cases cited in Respondent's Brief at 24 n.7; *but see Gatson v. Palmer*, 417 F.3d 1030, 1045 (9th Cir. 2005) ("Because this [state habeas] application ... was based on state law, it is irrelevant for purposes of ... state court collateral review of his federal claims.")), is because Congress made a determination to toll for "applications" (§ 2244(d)(2)), not claims, presumably in order to relieve the district courts of having to determine whether a particular *claim* raised in a properly filed state law challenge vehicle was or was not an issue of federal constitutional law.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

PATRICK C. LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L. WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R. BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag.ri.gov

Attorneys for Petitioner
A.T. Wall

AMICUS CURIAE BRIEF

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Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF DELAWARE, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOSEPH R. BIDEN, III
Attorney General of Delaware

PAUL R. WALLACE
Chief of Appeals
Counsel of Record

LOREN C. MEYERS
Special Deputy Attorney General

DEPARTMENT OF JUSTICE
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500
Paul.Wallace@state.de.us

Counsel for Amici Curiae

[Additional Counsel On Inside Cover]

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General of Alabama

DANIEL S. SULLIVAN
Attorney General of Alaska

TERRY GODDARD
Attorney General of Arizona

DUSTIN MCDANIEL
Attorney General of Arkansas

JOHN W. SUTHERS
Attorney General of Colorado

KEVIN T. KANE
Chief State's Attorney
for Connecticut

BILL MCCOLLUM
Attorney General of Florida

THURBERT E. BAKER
Attorney General of Georgia

MARK J. BENNETT
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

LISA MADIGAN
Attorney General of Illinois

GREGORY F. ZOELLER
Attorney General of Indiana

MARTHA COAKLEY
Attorney General
of Massachusetts

JIM HOOD
Attorney General
of Mississippi

STEVE BULLOCK
Attorney General of Montana

JON BRUNING
Attorney General
of Nebraska

GARY KING
Attorney General
of New Mexico

WAYNE STENEJEM
Attorney General
of North Dakota

RICHARD CORDRAY
Attorney General of Ohio

W.A. DREW EDMONDSON
Attorney General
of Oklahoma

THOMAS W. CORBETT, JR.
Attorney General
of Pennsylvania

HENRY D. MCMASTER
Attorney General
of South Carolina

MARTY J. JACKLEY
Attorney General
of South Dakota

GREG ABBOTT
Attorney General of Texas

MARK L. SHURTLEFF
Attorney General of Utah

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

BRUCE A. SALZBURG
Attorney General
of Wyoming

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INTEREST OF AMICI CURIAE

Amici States have an incontestable interest in promoting the principle of finality that motivated Congress to enact the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Mayle v. Felix*, 545 U.S. 644, 662 (2005); *see also Duncan v. Walker*, 533 U.S. 167, 179 (2001) (AEDPA's one-year limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments."). The question presented in this case focuses on 28 U.S.C. § 2244(d)(2), a provision which this Court has recognized "limits the harm to the interest in finality [of state court criminal judgments] by according tolling effect *only* to 'properly filed application[s] for State post-conviction or other collateral review.'" *Duncan*, 533 U.S. at 179-80 (emphasis added). In deciding whether a state court petition that requests only a sentencing court's mercy, but that alleges absolutely no legal or constitutional error, is an "application for State post-conviction or other collateral review," this Court decides whether unwarranted delay is tolerated and the finality of state court judgments postponed. Seeking to preserve benefits conferred upon them by Congress, Delaware and the other 27 amici States respectfully submit this brief in support of petitioner.

STATEMENT OF THE CASE

Amy and Julie Smith[1] were ages four and eight, respectively, when their mother divorced their father and began a relationship with Khalil Kholi. Soon thereafter, Kholi moved in and became a father figure to the girls. He controlled the household finances and was the family's sole disciplinarian. Eventually Kholi married the girls' mother, becoming their stepfather.

Kholi engaged in various sexual acts with both girls when they were very young progressing to sexual intercourse when they became teenagers. Amy described how he had engaged in repeated incidents of abuse from the time she was age five until she entered the sixth grade, at which time Kholi began to demand and thereafter consistently demanded intercourse. But it was not until she was seventeen, and only with her then-boyfriend's encouragement, that Amy told a school counselor of Kholi's abuse. It was then reported to social service and law enforcement authorities.

Kholi abused Julie for the first time when she was seven years old. He first demanded that Julie perform oral sex on him when she was approximately seven or eight. At eight or nine years old, Kholi

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[1] These are pseudonyms assigned to the girls by the Rhode Island Supreme Court during Kholi's direct appeal. *State v. Kholi*, 672 A.2d 429, 431 (R.I. 1996). This factual recitation of Kholi's crimes and sentence is taken from the state supreme court's decision on direct appeal. *Id.*

disrobed Julie and took graphic pictures of her. He then repeatedly threatened to show the pictures to Julie's mother and told Julie that if he did, she would have only herself to blame. Julie never disclosed the abuse to anyone until her younger sister confided her own accounts of their stepfather's abuse. Both girls testified that Kholi would condition the giving of necessities or the granting of privileges upon his obtaining sexual favors from them.

Kholi was convicted in the Rhode Island Superior Court of ten counts of first-degree sexual assault of his two stepdaughters. He was sentenced to life imprisonment on each count, with the first six counts to run concurrently with one another, but consecutively to the remaining four counts. In February 1996, the Supreme Court of Rhode Island affirmed Kholi's conviction on direct appeal. *State v. Kholi*, 672 A.2d 429 (R.I. 1996).

In May 1996, Kholi filed in the Rhode Island Superior Court a one-page *pro forma* sentence reduction motion [Joint App. 8-9] under that court's Rule 35 which permits the court to "reduce any sentence when a motion is filed" within certain time limits. R.I. SUPER. CT. R. CRIM. P. 35(a). All agree that Kholi's state court request was "a plea for leniency, simpliciter" that in no way "challenge[d] the *legality* of the sentence." Pet. App. 9, 11 (emphasis in original). *See, e.g.*, Resp. Brf. in Opp. 2 (describing such a petition as "a motion filed in state court for a discretionary reduction of sentence"). The motion was denied, and that decision was affirmed on appeal by

the Rhode Island Supreme Court. *Kholi v. State*, 706 A.2d 1326 (R.I. 1998). It is beyond dispute also that if this discretionary sentence reduction motion did not toll the limitations period from the date on which Kholi filed it until the date he finally filed his state post-conviction relief motion that did attack the validity of his conviction and sentence – a span of a year and a week – his federal habeas petition would be untimely. Pet. App. 7, 19.

A magistrate judge of the United States District Court for the District of Rhode Island, citing the holdings of the Third, Fourth and Eleventh Circuits and discounting as "unpersuasive" the contrary reasoning of the Tenth Circuit, concluded that Kholi's "Motion under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure was *not* a 'properly filed application for post-conviction or other collateral review' under 28 U.S.C. § 2244(d)(2), and therefore did not toll the limitations period." Pet. App. 30 (emphasis in original). The district court accepted the magistrate judge's report and recommendation and dismissed Kohli's habeas petition. Pet. App. 21. The First Circuit reversed, holding "that a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of 28 U.S.C. § 2244(d)(2)." Pet. App. 19.

SUMMARY OF THE ARGUMENT

Kholi's request for a sentence reduction under Rhode Island's Criminal Rule 35(a) did not constitute an "application for State post-conviction or other collateral review" that tolls AEDPA's limitations period. A *pro forma* petition under a state procedural rule that allows for discretionary relief from an imposed sentence based solely on mercy or grace meets none of the well-established standards of post-conviction or collateral attack. When Congress penned the AEDPA phrase "properly filed application for State post-conviction or other collateral review" it was hardly writing on a clean slate. Instead, Congress expects its statutes to be read in conformity with this Court's precedents. And this Court, on numerous occasions prior to AEDPA's enactment, had described the concept of "collateral review." In light of the Court's repeated description of collateral review as being the means by which a defendant attacks the validity of his conviction or sentence, only a state court proceeding in which the defendant challenges his conviction or sentence is consistent with Congress' use of the term "collateral review" in section 2244(d)(2). On that basis alone, the court of appeals was incorrect in viewing a mere prayer for sentencing leniency as triggering AEDPA's tolling provision.

A state court procedure that a prisoner need not pursue to exhaust state remedies does not toll AEDPA's limitations period. Congress' goal in enacting AEDPA was to speed up federal habeas review. Exhaustion of state remedies to first address federal

claims remained critical, and the tolling provision promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. In this regard, the tolling provision is inextricably intertwined with the core purpose of the habeas statute's exhaustion requirement. At the same time, however, the tolling provision limits the harm to the interest in finality by according tolling effect *only* to "properly filed application[s] for State post-conviction or other collateral review," that is, those motions for state relief that can address federal law questions. The minority view expressed by the First Circuit -- which would allow tolling for state sentence reduction motions that are no more than naked pleas for leniency – misapprehends this relationship between exhaustion of state court remedies and the limitations period that underlies the tolling provision itself. Only relevant state court remedies need be exhausted under 28 U.S.C. § 2254. Thus, only applications for such relevant remedies should toll the federal habeas limitations period. Any unwarranted expansion of the class of state applications that act as § 2244(d)(2) tolling mechanisms undermines Congress' intent to protect the States' "well-recognized interest in the finality of state court judgments."

ARGUMENT

I. Categorizing A Prayer For Post-Sentencing Leniency As An "Application For State Post-conviction Or Other Collateral Relief" Is Supported Neither By This Court's Precedents, Which Congress Incorporated In Its Statutory Language, Nor By The Statutory Context In Which The Phrase Appears.

Section 2244(d)(1) of Title 28 "requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year." *Evans v. Chavis*, 546 U.S. 189, 191 (2006). That limitations period is tolled for the "time during which a properly filed application for State post-conviction or other collateral relief is pending." 28 U.S.C. § 2244(d)(2). The vast majority of states give the trial judge the power to modify a sentence,[2] and the modification is usually triggered by a motion from the defendant

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[2] *See* ALASKA R. CRIM. P. 35(b); COLO. R. CRIM. P. 35(b); CONN. GEN. STAT. ANN. §§ 51-195 (sentence review procedure for sentence greater than 3 years), 53a-39 (reduction of sentence of less than 3 years by sentencing judge); D.C. SUPER. CT. R. CRIM. P. 35(b); DEL. SUPER. CT. CRIM. R. 35(b); FLA. R. CRIM. P. 3.800(c); GA. CODE ANN. § 17-10-1(f); HAW. R. PENAL P. 35(b); IDAHO CRIM. R. 35(b); 730 ILL. COMP. STAT. 5/5-4.5-50(d); IND. CODE ANN. § 35-38-1-17; LA. CODE CRIM. P. ANN. art. 881.1; MASS. R. CRIM. P. 29; MD. R. 4-344, 4-345; ME. R. CRIM. P. 35(b), (c); N.D. R. CRIM. P. 35(b); N.J. CT. R. 3:21-10(c); N.M. R. CRIM. P. 5-801; OKLA. STAT. ANN. tit. 22, § 982a; PA. R. CRIM. P. 720(B)(1)(a)(v); S.D. CODIFIED LAWS § 23A-31-1; TENN. R. CRIM. P. 35(b); 13 VT. STAT. ANN. § 7042; VT. R. CRIM. P. 35(b); W.VA. R. CRIM. P. 35(b); WIS. STAT. §§ 973.19, 973.195; WYO. R. CRIM. P. 35(b).

asking for the modification.[3] The First Circuit determined that a defendant's motion to modify or reduce his sentence is an "application for State post-conviction or other collateral relief" that tolls the limitation period established by section 2244(d)(1). That conclusion misapprehends the concept of collateral review reflected in section 2244(d).

"State post-conviction or other collateral review" as used in § 2244(d)(2), is not defined in the statute itself. *See generally Duncan*, 533 U.S. 167 (2001); *Artuz v. Bennett*, 531 U.S. 4 (2000); *see also Malcom v. Payne*, 281 F.3d 951, 957 (9th Cir. 2002). In discerning the meaning of certain key phrases of 28 U.S.C. § 2244, this Court has noted that all are not specifically defined and some are "term[s] of art." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). To determine the meaning of undefined phrases in federal statutes, the Court: (1) has recognized that Congress incorporates the settled meanings of such terms established by the Court, *United States v. Wells*, 519 U.S. 482, 495 (1997); and (2) looks to "the statutory context" in which they appear. *Magwood v. Patterson*, 130 S.Ct. 2788, 2797 (2010). Just so with the phrase "application for State post-conviction or other collateral review." *See Duncan,* 533 U.S. at 172-73, 77-78 (comparing text of § 2244(d)(2) to "the language of other

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[3] Some jurisdictions provide that the trial judge may act on his own to modify the defendant's sentence. *E.g.*, MASS. R. CRIM. P. 29(a); ME. R. CRIM. P. 35(c)(1); N.D. R. CRIM. P. 35(b)(2); VT. R. CRIM. P. 35(b); W.VA. R. CRIM. P. 35(b); WYO. R. CRIM. P. 35(b).

AEDPA provisions" in order to determine Congress' intent with regard to the meaning of "State post-conviction and other collateral review"); *Pace v. DiGuglielmo*, 544 U.S. 408, 420 (2005) (Stevens, J., dissenting) ("The words 'properly filed application for . . . collateral review' are not defined in AEDPA. We did, however, interpret those words in *Artuz v. Bennett* [citation omitted], by considering their ordinary meaning in the context of the statutory scheme in which they appear."); *see also Malcom*, 281 F.3d at 957 (*quoting DeGeorge v. United States Dist. Court for Cent. Dist. of California*, 219 F.3d 930, 936 (9th Cir. 2000)) ("Rather, 'to determine the plain meaning of a particular statutory provision, and thus congressional intent, the court looks to the entire statutory scheme.'"). The use here of either approach to statutory construction leads to the same conclusion: the term "application for State post-conviction or other collateral review" does not encompass requests based on mercy or leniency.

II. A Request Under A State's Procedural Rule For Post-Sentencing Discretionary Relief Based Solely On Mercy or Grace Meets None Of The Well-Established Standards of Collateral Attack.

The Court has recognized that Congress, in writing section 2244(d)(2), "may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology" used by the States in naming "the different forms of collateral

review that are available after a conviction." *Duncan*, 533 U.S. at 177. Using Florida procedure as an example, the Court observed that "the term 'post-conviction'" might refer to a specific procedure to obtain review of a conviction, distinct from other procedures available to litigate different types of claims for relief. *Duncan*, 533 U.S. at 177.[4] Thus, Congress chose to use the phrase "or other collateral" to make it plain that "the tolling provision applies to all types of state collateral review available after a conviction and not just to those denominated 'post-conviction' in the parlance of a particular jurisdiction." *Duncan*, 533 U.S. at 177.[5]

But that hardly means that Congress was writing on a clean slate. Instead, the Court had several times described the concept of collateral review as involving the challenges to the legality of the conviction or sentence. In 1952, the Court described the procedure established by 28 U.S.C. § 2255 as being

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[4] Modern collateral remedies vary considerably in their scope. Some are available only to defendants who are held in custody, while others permit a challenge by any convicted defendant whose claims have not become moot. The narrowest allow challenges only to jurisdictional defects, while the broadest extend to constitutional violations and various nonconstitutional claims.

W. LaFave, J. Israel, N. King, and O. Kerr, 7 CRIMINAL PROCEDURE § 28.1(a) at 139 (3d ed. 2007).

[5] "The various state and federal procedures for presenting post-appeal challenges are commonly described as 'collateral remedies.'" W. LaFave, J. Israel, N. King, and O. Kerr, 7 CRIMINAL PROCEDURE § 28.1(a) at 139 (3d ed. 2007).

"an independent and collateral inquiry into the validity of the conviction." *United States v. Hayman*, 342 U.S. 205, 222 (1952). The Court wrote in 1969 that "the provision of federal collateral remedies rests . . . upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States*, 394 U.S. 217, 226 (1969); *id.* at 228 ("Congress has determined that the full protection of [a defendant's] constitutional rights requires the availability of a mechanism for collateral attack."). Justice Harlan observed in *Mackey v. United States*, 401 U.S. 667 (1971), that "habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments [of conviction] that have become otherwise final." 401 U.S. at 682-83 (Harlan, J., concurring in part, dissenting in part). In rejecting a Suspension Clause challenge to the post-conviction procedure in the District of Columbia, the Court in *Swain v. Pressley*, 430 U.S. 372, 382 (1977), implied that the purpose of collateral review was "to test the legality of a person's detention. . . ." And "the established standards of collateral attack" were described in *United States v. Addonizio*, 442 U.S. 178, 185-86 (1979), as being challenges to the validity of the conviction or sentence because of jurisdictional, constitutional, or other fundamental errors in the proceedings.[6]

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[6] *See* American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: VOLUME IV, Standard 22-2.1(a) (2d ed. 1980) (describing recommended scope of post-conviction remedy).

Collateral review thus exists for the criminal defendant to challenge the legality of his conviction or sentence. *See Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005) ("a case challenging a sentence seeks a prisoner's 'release' in the only pertinent sense: It seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement . . . "); *Davis v. United States*, 411 U.S. 233, 254 (1973) (Marshall, J., dissenting) ("The traditional scope of collateral relief requires, again, that prisoners be afforded the broadest possible opportunity to present claims that their detention is the result of an unconstitutional procedure."). Because Congress, in writing section 2244(d)(2), used a term – "collateral review" – that has a settled meaning, the Court "must infer, unless the statute otherwise dictates, that Congress mean[t] to incorporate the established meaning" of the term. *NLRB v. AMAX Coal Co.*, 453 U.S. 322, 329 (1981). *See United States v. Wells*, 519 U.S. at 495 (*citing North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)) ("we presume that Congress expects its statutes to be read in conformity with this Court's precedents"). Thus, in light of this Court's repeated description of collateral review as being the means by which a defendant attacks the validity of his conviction or sentence, only a state court proceeding in which the defendant challenges his conviction or sentence is consistent with Congress' use of the term "collateral review" in section 2244(d)(2). *See Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002) (question under § 2244(d)(2) is whether the state court proceeding "challenge[d] the judgment pursuant to which

[the prisoner] is incarcerated"). The claims advanced in the state proceedings need not mirror those eventually presented in a federal habeas corpus petition,[7] but to come within the terms of section 2244(d)(2), the state proceeding has to challenge the validity of the conviction or sentence.

The lower federal courts have repeatedly applied this concept of collateral review to decide whether a particular motion filed by the defendant in state court tolled the limitations period. Motions for appointment of counsel or for post-conviction discovery, for example, do not toll the limitations period: those motions do not challenge the validity of the conviction or sentence. *See, e.g., Brown v. Sec'y of Dep't of Corr.*, 530 F.3d 1335, 1337-38 (11th Cir. 2008); *Voravongsa v. Wall*, 349 F.3d 1, 4-7 (1st Cir. 2003); *Maestas v. Long*, 74 Fed. Appx. 714 (9th Cir. 2003); *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001).

By no stretch of the imagination can a motion to reduce or modify a sentence, such as that filed in Respondent's case, be viewed to challenge the validity of the sentence. At common law, a court could revise a sentence during the term of court in which the sentence had been imposed. The common law rule did not just limit courts to correcting errors in the sentence, but allowed judges to reconsider the

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[7] *E.g., Cowherd v. Million*, 380 F.3d 909 (6th Cir. 2004); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Tillema v. Long*, 253 F.3d 494, 502 (9th Cir. 2001).

appropriateness of the sentence. *See United States v. Benz*, 282 U.S. 304 (1931); B. Carole Hoffman, Note, RULE 35(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: BALANCING THE INTERESTS UNDERLYING SENTENCE REDUCTION, 52 Fordham L. Rev. 283, 288-90 (1983).

When the Federal Rules of Criminal Procedure were promulgated in 1946, the common law power of the judge to reduce a sentence was codified in Rule 35.[8] The courts of appeals consistently viewed a motion for reduction of sentence under Rule 35 to be a plea for leniency, not a challenge to the legality of the sentence. *United States v. Cumbie*, 569 F.2d 273, 274 (5th Cir. 1978); *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973); *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). The purpose of the rule was to give the defendant an opportunity to ask the judge to reconsider the fairness of the sentence or to consider additional information that had not been presented at the time of sentencing. A motion to reduce the sentence presupposed a valid conviction[9] and a legally

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[8] FED. R. CRIM. P. 35, advisory committee note (1944). The rule was rewritten in 1984, the changes being effective November 1, 1987, in light of the Sentencing Reform Act of 1984 and adoption of the Sentencing Guidelines.

[9] *United States v. Sobell*, 314 F.2d 314, 331-32 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963) ("It would be quite improper for this Court, by utilizing Rule 35 to reduce Sobell's sentence, to place the Government in the same position as if the issue had been submitted to the jury and decided in his favor."); *Poole v. United*

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imposed sentence.[10] Conversely, "when a defendant requests a break because of events *after* the judgment that affect the judge's 'expectations,' it is impossible to characterize the request as a collateral attack on the judgment." *Romandine v. United States*, 206 F.3d 731, 735 (7th Cir. 2000) (emphasis in original).

Many states have promulgated court rules modeled on Federal Rule 35.[11] These provisions are "intended to provide the court with an opportunity during a limited period after sentencing to exercise leniency in the event the court, for some reason, determines that the sentence imposed was unduly severe or a shorter sentence would be desirable."[12]

States, 250 F.2d 396, 401 (D.C. Cir. 1957) (motion for reduction of sentence "is essentially a plea for leniency and presupposes a valid conviction. [Citation omitted.] It is wholly inappropriate to test the propriety of allowing a guilty plea to stand."). *Cf. Hill v. United States*, 368 U.S. 424, 430 (1962) (motion to correct illegal sentence presupposes a valid conviction; motion does not reach errors supposedly committed during trial).

[10] *United States v. Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970).

[11] *See, e.g.*, COLO. R. CRIM. P. 35(b); DEL. SUPER. CT. CRIM. R. 35(b), FLA. R. CRIM. P. 3.800(c); N.D. R. CRIM. P. 35(b); TENN. R. CRIM. P. 35(b). *See also* American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-7.1(a) (3d ed. 1994) ("The rules of procedure should authorize a sentencing court, upon motion of either party or on its own motion, to reduce the severity of any sentence.").

[12] R.I. SUPER. CT. R. CRIM. P. 35, historical note (1972). *See People v. Arnold*, 907 P.2d 686, 687 (Colo. App. 1995); *People v. Hanna*, 508 N.E.2d 765, 769-70 (Ill. App. 1987); *District Att'y for Northern Dist. v. Superior Court*, 172 N.E.2d 245, 250 (Mass.

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A state court motion to reduce a sentence is not a means by which the defendant can attack his conviction or sentence. *Commonwealth v. McCulloch*, 879 N.E.2d 685, 689-90 & nn.6-7 (Mass. 2008); S.D. CODIFIED LAWS § 23A-31-1 ("The remedies provided by this section are not a substitute for nor do they affect any remedies incident to post-conviction proceedings."). By way of example, the Delaware Supreme Court could hardly have been more clear about the difference: Delaware Superior Court Criminal "Rule 61 addresses post-conviction relief, which requires a legal challenge to the conviction, whereas Rule 35(b) allows a reduction of sentence, without regard to the legality of the conviction." *State v. Lewis*, 797 A.2d 1198, 1200 (Del. 2002). *See id.* at 1201 ("Rule 35(b) allows for a reduction of sentence without regard to the existence of a legal defect.").

1961); N.D. R. CRIM. P. 35, explanatory note (2010) ("A motion under the rule is essentially a plea for leniency and presupposes a valid conviction."); TENN. R. CRIM. P. 35, advisory committee's comment (2006) ("The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice."); VT. R. CRIM. P. 35, reporter's notes (2010) (when construed in a manner consistent with Federal Rule 35, invocation of such a rule "urge[s] that the court take a fresh look at its sentence with the hope that the passage of time will find the court more sympathetic to [the prisoner's] position"); S. Grossman & S. Shapiro, JUDICIAL MODIFICATION OF SENTENCES IN MARYLAND, 33 U. Balt. L. Rev. 1, 12 (2003) (noting that in some states, sentence reductions under the particular rule are also used "either as a reward or a response to a defendant's rehabilitation").

Because a motion for reduction of sentence does not challenge the validity of the conviction or sentence, any such motion does not trigger section 2244(d)(2). That point was made by the Fourth Circuit in *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001) when the court held that a motion for reduction of sentence under West Virginia law did not act to toll the limitations period. According to the court, a "collateral" proceeding typically challenged "the legality of the earlier proceeding or judgment," but a motion for reduction of sentence "does not allege any error at all. . . . The only issue before the court on a Rule 35(b) motion is whether the defendant, although sentenced in conformity with applicable laws, nevertheless presents some compelling *non-legal* justification that warrants mercy." 272 F.3d at 238 (emphasis in original). Because the motion for reduction of sentence "[did] not entail a legal challenge to the original sentence," the motion did not toll the limitations period. 272 F.3d at 239. The Third, Seventh, and Eleventh Circuits have reached conclusions identical to that of the Fourth Circuit: only a motion that attacks the validity of the sentence will stop the clock from running on the limitations period. *Hartmann v. Carroll*, 492 F.3d 478, 481-84 (3d Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008) (motion for reduction of sentence under Delaware law (DEL. SUPER. CT. R. CRIM. P. 35(b)); *Lozano v. Frank*, 424 F.3d 554, 556 (7th Cir. 2005) (sentence reduction under Wisconsin law "based on his post-conviction cooperation with authorities"); *Davis v. Barrow*, 540 F.3d 1323, 1324 (11th Cir. 2008) (reduction of sentence under Georgia

law (O.C.G.A. § 17-10-1(f)); *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297-98 (11th Cir. 2008) (motion for reduction of sentence under Florida law (FLA. R. CRIM. P. 3.800(c)); *Bridges v. Johnson*, 284 F.3d 1201, 1204 (11th Cir. 2002) (Georgia sentence review procedure).

The Tenth Circuit has decided, as has the First Circuit in this case, that motions for reduction of sentence do trigger the tolling provision of section 2244(d)(2). *Howard v. Ulibarri*, 457 F.3d 1146, 1147-49 (10th Cir. 2006) (N.M. R. CRIM. P. 5-801(B)); *Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006) (COLO. R. CRIM. P. 35(b)). But the Tenth Circuit and the First Circuit did not recognize that the term "collateral review" is a "term of art," *see Slack v. McDaniel*, 529 U.S. 473, 486 (2000), the meaning of which is derived from this Court's repeated description of "collateral review" as a proceeding in which a prisoner seeks to upset a judgment of conviction. A motion for reduction of sentence might in a broad sense ask the sentencing judge to "review" the sentence he imposed, but only insofar as "review" encompasses "reconsideration;" a motion for reduction of sentence assumes that the conviction is valid. And both the First Circuit and Tenth Circuit give too much weight to "the unseemly prospect" that a prisoner could ask for federal habeas relief while simultaneously asking the sentencing judge to reduce his sentence. Pet. App. 18; *Howard*, 457 F.3d at 1148; *Robinson*, 443 F.3d at 721 (to hold that a motion for reduction of sentence did not toll the limitations

period "'would raise questions of comity'") (*quoting Martin v. Embry*, 1999 WL 1123077 at *2 (10th Cir. Dec. 8, 1999)). Contrary to the thinking of those courts of appeals, there is nothing untoward when a prisoner chooses to litigate in both federal and state court; indeed, there can hardly be any comity concerns when the state court proceedings involve a motion to reduce the sentence, a situation in which only state law claims are likely to be at issue. *See Pringle v. Court of Common Pleas*, 744 F.2d 297, 300 (3d Cir. 1984); *Carter v. Estelle*, 677 F.2d 427, 436 n.4 (5th Cir. 1982); *United States ex rel. Sniffen v. Follette*, 393 F.2d 726, 727 (2d Cir. 1968); *United States ex rel. Boyance v. Myers*, 372 F.2d 111, 112 (3d Cir. 1967) ("It is no bar to federal adjudication of the merits of the present claim that a separate claim for relief on a different ground is pending in a state court.").

III. Because Wholly Discretionary Review Of A Sentence Pursuant To A State Procedure Allowing For Post Hoc Sentencing Leniency Has Nothing To Do With The Exhaustion Requirement, Congress Did Not Intend To Toll AEDPA's Statute Of Limitations During Such Review.

The term "collateral review," while undefined in the statute, has an historic pedigree that cannot be ignored. But the meaning of that term urged by Petitioner and the amici States – which excludes "a plea for leniency, simpliciter" – is likewise altogether

consistent with the purpose of state collateral review in the overall statutory context of AEDPA. And "look[ing] first to the statutory context" of undefined AEDPA phrases is a well-accepted method of statutory construction. *Magwood v. Patterson*, 130 S.Ct. 2788, 2797 (2010).

As this Court explained in *Duncan v. Walker*, "[t]he tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period." 533 U.S. at 179. Congress wanted to accelerate the federal habeas process, while continuing to require prisoners to exhaust their state remedies. Tolling during the pendency of state proceedings that are *not* needed for exhaustion does not serve that balance struck by Congress. To the contrary, it upsets the balance by slowing down the federal habeas process while not furthering the exhaustion requirement. In light of this statutory context, the phrase "application for State post-conviction or other collateral relief" should be read not to encompass state proceedings that seek relief that is unavailable in federal habeas and therefore do not need to be exhausted.

A. Section 2244(d) Balances The Statutory Imperative To Expedite Federal Habeas Review And The Exhaustion Requirement. A State Procedure Not Needed For Exhaustion Should Not Impede The Federal Habeas Process.

As applied here, habeas petitions contain allegations of constitutional violations that occurred at a state trial and which render the subsequent confinement of a prisoner unconstitutional. In short, federal law challenges to a state custodial judgment are the stuff of which federal habeas petitions are made and which must be exhausted. 28 U.S.C. § 2254(a).[13] AEDPA's tolling provision is inextricably intertwined with the habeas statute's exhaustion requirement. AEDPA's exhaustion doctrine requires a habeas petitioner to "give the state courts [the] [ ] opportunity to resolve any *constitutional issues*" through the State's appellate process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (emphasis added); *see also Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) (noting that "[a] rigorously enforced total exhaustion rule" gives state courts "the first opportunity to review *all claims of constitutional error*") (emphasis added). Any requirement of tolling for state sentencing leniency

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[13] 28 U.S.C. § 2254(a) provides that: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States*." (emphasis added).

entreaties bears no relationship to the balance between exhaustion of state court remedies for federal legal or constitutional error and the limitations period that underlies the tolling provision itself.

Under the First Circuit's construct, the exhaustion doctrine would encompass not only any claim that brings to the forefront the need for relief from a constitutional violation, but exhaustion of any want of the petitioner for any possible form of state court relief. The First Circuit takes the view that any state proceeding should toll if it has the potential of rendering the federal case moot by reducing the sentence to time served and thus ending the prisoner's confinement, the basis for federal habeas jurisdiction, or if it otherwise satisfies the prisoner. Pet. App. 18 ("The granting of a motion for leniency might well eliminate the incentive for seeking federal habeas review at all (as would be true, say, if the motion were granted and the sentence reduced to time served).").

But this notion does not square with the reality that section 2244's statute of limitations provision, with its concomitant tolling exception, and the exhaustion requirement of section 2254(c) are inseparable and "work together." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007); *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (a state petitioner must comply with both the one-year time limit and the exhaustion requirement). It further ignores the fact that "[t]he tolling provision of § 2244(d)(2) balances the interests

served by the exhaustion requirement[14] and the limitation period." *Duncan*, 533 U.S. at 179. This immutable relationship between the exhaustion requirement and AEDPA's limitation period fatally undercuts any argument favoring the First Circuit's reading; tolling AEDPA's limitation period for sentence leniency motions undermines the State's interest in finality while doing absolutely nothing to advance exhaustion of relevant state remedies. *Hartmann*, 492 F.3d at 478 ("Where the goals of exhaustion end, the need for tolling recedes."). AEDPA's strict statutorily limited tolling, perforce, need only occur to give petitioners the opportunity to exhaust that which they can and must present to a federal habeas court "'and *then* to file their federal habeas petitions *as soon as possible*.'" *Lawrence*, 549 U.S. at 327 (*quoting Duncan*, 533 U.S. at 181) (emphasis in originals).

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[14] The exhaustion doctrine requires that a habeas petitioner present the substance of his claim to the state courts so that those courts have a fair "opportunity to apply controlling legal principles to the facts bearing upon [the petitioner's] *constitutional* claim." *Picard v. Connor*, 404 U.S. 270, 272 (1971) (emphasis added). As this Court noted in *Duncan*, the tolling provision promotes the exhaustion of state remedies for those constitutional claims by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect *only* to "properly filed application[s] for State post-conviction or other collateral review." *Duncan*, 533 U.S. at 180.

B. The Interest In Finality Of State Court Judgments Is Undermined By Tolling For Leniency Proceedings That Are Relatively Illimitable.

A motion to reduce a sentence under a rule such as Rhode Island's Rule 35 is "'essentially a plea for leniency.'" *State v. Mendoza*, 958 A.2d 1159, 1161 (R.I. 2008) (*quoting State v. Burke*, 876 A.2d 1109, 1112 (R.I. 2005); *State v. Ferrara*, 818 A.2d 642, 644 (R.I. 2003)). Such a request is left to the sound discretion of the state trial justice, "who may grant it if he or she decides 'on reflection or on the basis of changed circumstances that the sentence originally imposed was, for any reason, unduly severe.'" *Id.* (*quoting State v. Furtado*, 774 A.2d 38, 39 (R.I. 2001); *State v. Byrnes*, 456 A.2d 742, 744-45 (R.I. 1983)). *See also State v. Gunwall*, 522 N.W.2d 183 (N.D. 1994) (reduction of sentence under North Dakota's Rule 35(b) is not a right but an application for leniency left to the sound discretion of the trial court). The reason for such rules – many of which are modeled after Federal Rule 35 – is to give a sentencing judge a second chance to consider whether the initial sentence is appropriate. *E.g.*, *Ghrist v. People*, 897 P.2d 809, 812 (Colo. 1995). *See Ellenbogen*, 390 F.2d at 543; *see also Maynard*, 485 F.2d at 248 (Rule 35 allows sentencing court "to decide if, on further reflection, the original sentence now seems unduly harsh" . . . such request "is essentially a 'plea for leniency.'") (citations omitted). Not only are the bases for the grant or denial of such a motion relaxed, but the time for filing and

disposition of these applications is relatively unchecked. *E.g.*, *United States v. Springs*, 988 F.2d 746, 748 (7th Cir. 1993) ("The version of Fed. R. Crim. P. 35 applicable to pre-Guidelines sentences allowed district judges to reduce sentences in response to motions filed as late as 120 days after the appellate mandate, which as a practical matter left district judges with several years of superintendence."). Consequently, these leniency applications are fraught with the danger of delay. *See State v. Fisch*, 133 P.3d 1246, 1248-49 (Idaho Ct. App. 2006) (holding that 13 months to decide Rule 35 motion was a "reasonable time" under the rule). And this delay, which sometimes is the result of the trial court's desire to retain prolonged control over the sentence,[15] has required both federal and state courts to address the misuse of Rule 35 reduction motions as "a substitute for the consideration of parole" or similar executive branch consideration of sentence reduction. *United States v. Stollings*, 516 F.2d 1287, 1289 (4th Cir. 1975). *See Diggs v. United States*, 740 F.2d 239, 246-47 (3d Cir. 1984); *United States v. Taylor*, 768 F.2d 114, 117-18 (6th Cir. 1985) (listing cases). *See also Mamula v. People*, 847 P.2d 1135, 1137-38 (Colo. 1993) (trial court cannot be permitted "to hold timely motion for reduction of sentence in abeyance for months or years

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[15] *See S. Grossman & S. Shapiro*, 33 U. Balt. L. Rev. at 39-40 (deferring disposition of motions to reduce sentence enabled sentencing judges to follow defendants' progress in substance abuse treatment programs and to monitor defendants' compliance with terms of original sentence).

while the defendant builds a record of conduct within the department of corrections").

Unwarranted expansion of the class of state applications that act as § 2244(d)(2) tolling mechanisms undermines Congress' intent to protect the States' "well-recognized interest in the finality of state court judgments." *Duncan,* 533 U.S. at 179. "Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson,* 523 U.S. 538, 555 (1998). Inclusion of these far less-regulated applications for state sentencing leniency[16] not only prolongs uncertainty concerning the finality of state court judgments, but ultimately subjects those judgments to greater risk of reversal. The longer state or federal review lasts, the greater the risk that "[p]assage of time, erosion of memory, and dispersion of witnesses" will preclude retrial and "reward the accused with complete freedom from prosecution." *Engle v. Isaac,* 456 U.S. 107, 127-28 (1982); *see also David v. Hall,* 318 F.3d 343, 347 (1st Cir. 2003) ("There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear."). As the Third Circuit observed, should mercy petitions be included as § 2244(d)(2) tolling agents, prisoners might be inclined "to file frivolous

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[16] *See* nn.2 & 3 *supra.*

requests for leniency merely as a delay tactic." *Hartmann*, 492 F.2d at 478.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JOSEPH R. BIDEN, III
Attorney General of Delaware

PAUL R. WALLACE
Chief of Appeals
Counsel of Record

LOREN C. MEYERS
Special Deputy Attorney General

DEPARTMENT OF JUSTICE
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500
Paul.Wallace@state.de.us

Counsel for Amici Curiae